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Commonwealth of Kentucky
Supreme Court
2008 – SC –000383 – MR

Shawn Windsor — Appellant

v.

Appeal from Jefferson Circuit Court
No. 04-CR-000001
Death Penalty Case

Commonwealth of Kentucky — Appellee

Brief for Appellant , Shawn Windsor

Submitted by

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Certificate of Service

I hereby certify that copies of this Brief were delivered or mailed to Ms. Carol Cobb, Assistant Commonwealth's Attorney, 514 W. Liberty Street, Louisville, Ky. 40202, and to Hon. Martin McDonald, Judge Jefferson Circuit Court, Division 6, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202, on December 15, 2008. A copy was mailed to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Ky. 40601, on this same date. The record on appeal has been returned to the Circuit Court Clerk.

J. David Niehaus

Introduction

This is a death penalty case in which Shawn Windsor appeals from an Amended Judgment imposing two death sentences and other lesser penalties upon conviction of two counts of murder, one count of theft and one count of violating a protective order.

Request for Oral Argument

Because this is a death penalty case, oral argument is mandated by KRS 532.075. Appellant would in any event request oral argument because of the grave nature of this appeal and the importance of the issues raised here.

Note Concerning Citations to Record

The record on appeal is made up of five volumes of clerk's record, two volumes of discovery, and three videocassettes. Appellant cites to the clerk's record as (TR). There are no citations to the discovery volumes. There are two miscellaneous tapes cited (VR-1) & (VR-2)respectively. The third tape was to have been the trial tape and is cited (VR-3). References to the Appendix of this Brief are made (App).

Table of Points and Authorities

(3). KRS 532.030(4) mandates submission of the sentence to a jury "in all cases." A judge cannot disregard this plain direction. Because jury sentencing is not a personal right, a defendant cannot waive it.

(4). By making the judge rather than the jury the final sentencer in death penalty cases, KRS 532.025 and KRS 532.030 violate Section 11 of the Constitution.

Statement of the Case

This is an appeal of right from an Amended Judgment that imposes two (2) death sentences, and sentences for theft and violation of a protective order. (TR 606-607; App 6-7). As the Court will recall, this is an appeal from an unconditional guilty plea. [Windsor v. Commonwealth, 250 S. W. 3d 306 (Ky. 2008)]. As such, the range of possible issues is reduced. [p. 307]. Because the statement of facts and proceedings is limited by CR 76.12(4)(c)(iv) to those matters necessary to illustrate the issues raised, this Statement will be relatively brief.

Appellant was indicted in January, 2004 on two counts of murder, one count of felony theft and one count of violating a protective order. (TR 1-2). Although the offenses occurred in December, 2003, Mr. Windsor was not arrested and arraigned on the Indictment until July, 2004. (TR 8). In September, 2004, the government filed a formal notice of aggravating circumstances, alleging that it was authorized to seek enhanced penalties because Appellant had intentionally caused multiple deaths and that he had killed his wife and son while a protective order was in effect. (TR 10). From the beginning of the proceedings, it was apparent that the government would not consider a plea offer on a lesser sentence than death. (TR 31).

On Friday, July 7, 2006, as trial approached, Appellant took a significant overdose of a prescribed medication. He was taken from Louisville Metro Corrections to University Hospital for treatment. (TR 326).

The Circuit Judge conducted a hearing on Thursday, July 13th to determine Appellant's situation. After hearing from two psychiatrists, and receiving medical records provided from University Hospital, the judge took the question of competency under submission. Mr. Windsor was not present at this hearing. The following day, July 14th, Judge McDonald announced a finding of competency. He stated, based on what he had heard and read, that although Appellant might not be "firing on all cylinders" he met the statutory threshold and was "clearly" competent to stand trial. (VR-3, 7/14/06, 10:19:40).

When the case was called on Monday, July 17th, Appellant advised that he wished to enter a plea of guilty and to receive the death sentence. (VR-3, 7/17/06, 11:17:10-11:18:00). Counsel, aware of Appellant's position, filed a written motion asking for a brief delay, of perhaps 2-3 days, to evaluate Appellant's competence in light of the change of plea. (TR 380-383). Counsel argued the point as well. (VR-3, 7/17/06, 11:18:22-11:20:53). The response of the attorneys for the Commonwealth was that the changed plea did not require a "subsequent competency evaluation and or a hearing." (VR-3, 11/17/06, 11:21:17). Referring to the hearing that had been conducted days before, the government argued that Judge McDonald could rely on the earlier finding of competency. (VR-3, 7/17/06, 11:27:28-11:27:54). After hearing further argument from counsel, the judge addressed Appellant directly. Mr. Windsor responded that "I feel that I am completely competent. I have no residual effects from the overdose of last week and I would ask the court to accept my plea of

guilty because I am accepting full responsibility for my actions." (VR-3, 7/17/06, 11:31:51). In a conference at the bench, Judge McDonald advised that he would not conduct any further proceedings as to competency: " . . . he's competent. I found him competent and I haven't heard anything that changes my mind on that so he is competent . . ." (VR-3, 7/17/06, 11:33:45-11:34:02).

Appellant executed two written forms. The first, an AOC 491.1 Form, contained the Commonwealth's recommended penalties. (TR 445; App 8-9). The second form was a modified AOC-491 plea of guilty form. (TR 446; App 10-11). Numerical paragraphs 5, 6 and 7 on the front of the form acknowledged that Appellant was requesting the sentence of death, that he was doing so against the advice of counsel, that death was the maximum possible sentence, that he waived his right to jury sentencing, and that he waived his right to present mitigating evidence. (TR 446; App 10). The second form was executed on July 14, 2006. (TR 447; App 11).

During the course of the *Boykin* hearing, the judge inquired again as to Appellant's mental state. Mr. Windsor denied any "mental issues" in the past. He admitted to going to counseling when he was younger. In response to specific questions, Appellant stated that he was not sick that day and was not currently taking any drugs or medication. (VR-3, 7/17/06, 11:49:51-11:51:28).

Appellant admitted that he killed his wife and son by bludgeoning them with a dumbbell. (VR-3, 7/17/06, 11:52:09-11:52:27). He again acknowledged

that his action was against the advice of counsel and waived his trial rights. (VR-3, 7/17/06, 11:52:41-11:57:02).

Judge McDonald was assured by Mr. Windsor that the plea was his own voluntary act and that no one had threatened him or promised him anything in exchange for the plea. (VR-3, 7/17/06, 11:57:06-11:57:33). When asked why he was pleading guilty, Appellant responded that he was taking responsibility for the acts that he had committed. (VR-3, 7/17/06, 11:58:00-11:58:15). Mr. Windsor wished the judge to sentence him and to be sentenced to death. (VR-3, 7/17/06, 11:58:26). He answered "guilty" each time when the judge asked him to plead as to the four counts of the Indictment. (VR-3, 7/17/06, 11:58:47-11:59:34). And he answered "Yes, Sir" when the judge asked "do you want me to accept your plea and find you guilty of the offenses as indicted?". The plea was then accepted as knowing and voluntary. (VR-3. 7/17/06, 12:16:53; 12:17:16). Appellant's request for immediate imposition of sentence was denied by the judge. (VR-3, 7/17/06, 12:19:14).

At the sentencing proceeding on October 26 and 27, 2006, Appellant advised that he wished to receive death and objected to any hearing as to mitigation. (VR-1, 10/26/06, 10:12:57-10:14:15; 10:14:20; 10:14:49). After inquiry, including Appellant's statements that mitigation amounted to nothing more than an attempt to "weasel out" of responsibility and that he "unequivocally" waived his right, the judge found his waiver to be knowing and voluntary. (VR-1, 10/26/06, 10:18:51-10:19:25). However, the judge also

determined to hear from defense counsel. Counsel introduced a large amount of documentary evidence and produced two witnesses as to Appellant's psychological health. At the conclusion of the hearing, the judge set a deadline for filing supplemental memoranda and advised that he would enter a judgment after that period expired. The initial Judgment was entered on November 17, 2006. (TR 518). Pursuant to an Opinion rendered by this Court on April 24, 2008, an Amended Judgment imposing the penalty of death, but expressly permitting direct appeal, was entered. (TR 607; App 7). This appeal follows.

Argument

(1). The trial court erred by failing to postpone all proceedings until a thorough competency evaluation was undertaken. A defendant's attempted suicide ten days before the entry of a guilty plea is ample ground on which to question the defendant's competency, especially in light of a stated desire to be sentenced to death.

As noted in the Statement of the Case, appointed counsel filed a written motion to "stay proceedings pending a determination of the Defendant's competency in light of his request for the Court to impose the death penalty." (TR 380). The Motion recited the timeline of events. On July 7, 2006, Appellant was found unconscious in his jail cell. He was taken to the hospital and treated. A competency hearing was conducted on July 13th. (TR 381). On July 14th, Judge McDonald found Appellant competent to stand trial. (VR-3, 7/14/06, 10:19:40).

According to the Motion, Appellant next signed guilty plea forms, asking the judge "to accept his guilty plea and sentence him to death. In short, he asks the Court to finish his own suicide." (TR 382). Counsel maintained that this step called Mr. Windsor's competency into question, despite the recent finding of competency. (TR 382). The judge was referred to a letter from Dr. Walter Butler, a psychiatrist who had examined Appellant and testified at the hearing on July 13th. (TR 382). The letter was attached to the motion. In pertinent part it reiterated Dr. Butler's opinion that Appellant likely had not "completely recovered from his recent overdose on antidepressant medication." (TR 388; App 12). The letter continued that

> In addition, University of Louisville Professor of Psychiatry Steven Lippmann's evaluation of your client while he was in the medical intensive care unit at University Hospital on Monday noted your client's significant symptoms of depression and post-traumatic stress disorder. Dr. Lippmann noted that your client was 'overtly depressed, hopeless, guilt-ridden . . .'
>
> I believe that your client's current clinical presentation may represent both the continuing organic impact of the overdose, as well as a manifestation of the significant depression and post-traumatic stress disorder as identified by Dr. Lippmann in his consultation. Either or both of these circumstances could adversely impact your client's ability to effectively consult with counsel, understand the proceedings and make informed choices. (TR 388; App 12).

On the next page, the letter recommended tests to determine the extent of potential organic brain injury resulting from the drug overdose. It also recommended a "battery of psychological tests" to assess Mr. Windsor's "degree of depression, which depending on severity, can affect his ability to think and concentrate." (TR 389; App 13). The tests would be useful because a psychologist could use the result to "determine the degree of depression and post-traumatic stress disorder symptoms currently present, and give an opinion as to its impact on your client's capacity for rational decisionmaking." (TR 389; App 13).

On the morning of the 17th, counsel argued in favor of the Motion, outlining its points for the judge and referring to Dr. Butler's letter. Counsel urged a stay of proceedings because "there is no margin for error here." (VR-3, 7/17/06, 11:20:15). In light of recent history, a suicide attempt ten days before, a "split of opinion" as to competency between the mental health professionals

who testified at the July 13th hearing, and then a request for the death penalty, "we're suggesting that the Court needs to stay these proceedings according to the rule to reexamine the competency issue and that's what we've moved the Court to do." (VR-3, 7/17/06, 11:20:23-11:21:30).

The Commonwealth responded by pointing out that the judge had just found Appellant competent to stand trial and that because of that "we believe that he is competent to plead guilty." (VR-3, 7/17/06, 11:27:50). The government's solution was that, even if Appellant gave up his right to direct appeal, "he has numerous post-conviction remedies that if there is something that the court, you know if the court allows him to plead guilty and some other court decides that that wasn't the right thing to do he's going to have numerous opportunities to present that to several different courts along the way because of the nature of this case." (VR-3, 7/17/06, 11:27:00-11:27:28).

After defense counsel replied to this argument, the government's lawyer pointed out that Mr. Windsor was not raising the issue of competency and that "the bottom line in this is what he wants to do." (VR-3, 7/17/06, 11:29:25).

Defense counsel again pointed out that "we don't know that it is what he wants to do as a result of being completely informed, absolutely understanding the proceedings, the implications of it, and not wanting to kill himself as the result of a mental situation, be it, I don't know what, depression, damage from this overdose, whatever." (VR-3, 7/17/06, 11:29:40-11:30:05).

At the government's suggestion, and over counsel's objection, (VR-3, 7/17/06, 11:30:45-11:31:00), Judge McDonald inquired of Appellant. Mr. Windsor responded that he disagreed with counsel. "I feel that I am completely competent. I have no residual effects from the overdose of last week and I would ask the court to accept my plea of guilty because I am accepting full responsibility for my actions." (VR-3, 7/17/06, 11:31:51).

Judge McDonald held that Appellant had been found competent "and I haven't heard anything that changes my mind. . ." (VR-3, 7/17/06, 11:33:45). The plea of guilty was made and accepted. Appellant respectfully maintains that Judge McDonald erred by not ordering a new competency evaluation procedure.

KRS 504.100(1) and RCr 8.06 both mandate suspension of proceedings when there are "reasonable grounds" to believe that a defendant cannot understand the reason for and the nature of the proceedings or is unable to participate rationally in his own defense. These two provisions effect the due process guarantee of the 14th Amendment of the U. S. Constitution [Chapman v. Commonwealth, 265 S. W. 3d 156, 173-174, fn. 48 (Ky., 2008); Smith v. Commonwealth, 244 S. W. 3d 757, 760 (Ky. App., 2008)]. Appellant also maintains that the prohibition against arbitrary government action in Section 2 of the Constitution of Kentucky prohibits any prosecution if a defendant is materially impaired.

Recently, in Gray v. Commonwealth, 233 S. W. 3d 715 (Ky., 2007), the Court restated the guidelines for employing the competency provisions.

Although the question of competency is addressed to the trial court's discretion, "once facts known to the trial court are sufficient to place a defendant's competency at issue, an evaluation and evidentiary hearing are mandatory." [p. 718]. The standard is "[w]hether a reasonable judge . . . should have experienced doubt with respect to competency to stand trial." [p. 718]. In this case, any reasonable judge would have stopped proceedings for at least a few days to sort out the question of competency.

It bears noting that in Chapman the judge did not face a recent suicide attempt and a sudden switch to a guilty plea. Even so, that judge required Mr. Chapman to undergo evaluation twice after he expressed a desire to plead guilty and seek death. [p. 180]. In this case, there was a hearing 6 days after the overdose followed by a finding of competency on the seventh day. On the following Monday, ten days after the overdose, Mr. Windsor stated his desire to plead guilty and seek death. Defense counsel obtained a letter from Dr. Butler directing the judge's attention to Dr. Lippmann's observations about depression and post traumatic stress problems.

Judge McDonald had access to the psychiatric notes because the records from University Hospital were obtained by special order of the court. They are in a white envelope in the record on appeal to which a *Sua Sponte* order directing production is attached. Photocopies of the notes are found on pages 14-17 of the Appendix to this Brief. Dr. Butler had referred to these records in passing at the July 13th hearing. (VR-3, 7/13/06, 14:58:11-14:59:40).

The hospital records show that Mr. Windsor stated that he did not want to live and decided to kill himself. (App 14). He was characterized as "definitely suicidal." (App 15). A brief diagnosis posits "Probable PTSD, Depression, NOS" (App 15). Dr. Lippmann's observations on July 10th were that Appellant was "overtly depressed, hopeless, guilt-ridden, wishes for death, 'no reason to live,' wants to die." (App 16). Appellant was considered "depressed" and an "overt suicide risk now, PTSD." (App 16).

In light of Dr. Butler's cautionary letter and the uncontroverted evidence in the hospital file, any reasonable person would have been troubled by the sudden desire to plead guilty and demand the death penalty. At minimum, Dr. Lippmann should have been called as a witness. Instead, relying on the assurances of a man who had tried to kill himself only ten days earlier, Judge McDonald concluded that there was no need to change his view of Appellant's competency. This was error.

Proceedings should have been halted at least until further evidence had been heard on the effect of depression and post traumatic stress disorder. Failure to do so was error that renders the guilty plea and subsequent sentencing invalid. The Judgment must be reversed and the case remanded for further proceedings.

(2). The Judgment indicates that the circuit judge believed that death was the appropriate punishment in the absence of sufficient evidence showing otherwise.

This issue was not presented in circuit court. It is raised here because it appears that the sentencing judge engaged in a weighing of sentencing evidence and found expressly that "the mitigating evidence presented does not excuse or justify the Defendant's actions in any way and that the death penalty is warranted." (TR 605; App 5). Because sentencing is jurisdictional, an issue as to the propriety of the sentencing process is always available on appeal, regardless of the failure to present the issue at the trial level. [Windsor v. Commonwealth, 250 S. W. 3d 306, 307 (Ky., 2008); Cummings v. Commonwealth, 226 S. W. 3d 62, 66 (Ky., 2007)]. To determine the extent of the error, it is necessary first to examine the capital sentencing statue. Once the plain language of KRS 532.025 is understood, this error, and the error in the following points of argument will be easily seen.

KRS 532.025 was patterned on a Georgia statute that was upheld by the U. S. Supreme Court in 1976. Such statutes are considered "threshold" statutes because "[o]nce the eligibility decision has been made, the selection decision is very unstructured. The jury is not given any specific instructions on how to evaluate, weigh or consider the evidence presented in the penalty phase. Jurors are told they may consider all of the evidence presented in making a decision." [Carter, et al., *Understanding Capital Punishment Law, 2d Edition*, §6.03, p. 45-46 (LexisNexis, 2008)]. The conventional wisdom in Kentucky is that because the

Georgia statute from which KRS 532.025 was copied has been upheld by the federal Supreme Court, the whole concept of threshold sentencing is proper and a sufficient safeguard against arbitrary condemnation to death.

But overlooked in this uncritical examination of the law by lawyers and judges is that KRS 532.025 is part of the Penal Code and is subject to the general provisions of that Code. Specifically, it is subject to KRS 500.070.

The Court of Justice determines legislative intent from the language of the statutes. Where statutes are unambiguous, courts cannot rely on any techniques of construction. [Richardson v. Lousiville Metro Government, 260 S. W. 3d 777, 779 (Ky., 2008)]. Rather, the Court assumes that the legislature meant exactly what it said and said exactly what it meant. [Revenue Cabinet v. O'Daniel, 153 S. W. 3d 815, 819 (Ky., 2005)]. The Court of Justice cannot substitute its judgment for that of the Legislative Branch because Section 28 of the Constitution strictly forbids exercise by one branch of government of the powers of another. Thus, the Court of Justice either accepts unambiguous statutes "whole hog" or declares them unenforceable. There is no middle position in which a court may massage a statute to achieve a perceived "better" result. [Mondie v. Commonwealth, 158 S. W. 3d 203, 209 (Ky., 2005)]. These rules must be followed here.

There is no burden of proof stated in KRS 532.025. This is true even though Subsection (3) of the statute prohibits imposition of enhanced punishments unless at least one statutory aggravating circumstance is found. But the absence of express language is not a problem because the lack is supplied by

KRS 500.070(1). The first sentence of Subsection (1) imposes on the government "the burden of proving every element of the case beyond a reasonable doubt . . ." Thus, under KRS 500.070(1), the government has the burden of proving beyond a reasonable doubt the existence of one or more aggravating circumstances. Failure to do so prevents imposition of enhanced punishments.

Appellant's point in this argument is that the use of the phrase "every element of the case" applies to *every* element of the case, including the punishment to be imposed. As noted above, the General Assembly is deemed capable of expressing its intent with precision. Had the legislature intended to limit the burden of proof just to elements of the criminal offense, it could have said so by using the word "offense" instead of "case." Had the legislature intended to extend the burden to proof of an aggravating circumstance, it could have said so explicitly. It did not. The plain language of KRS 500.070(1) says every element of the "case."

The word "case" is not defined by statute. Thus, the ordinary meaning of the word must be employed. [KRS 446.080(4); Terry v. Commonwealth, 253 S. W. 3d 466, 474 (Ky., 2007)].

The legal definition of "case" is "a civil or criminal proceeding, action, suit, or controversy at law or in equity." [*Black's Law Dictionary, 8th Edition*, p. 228 (2004)]. This comports with the ordinary meaning: "a suit or action at law." [*Random House Webster's College Dictionary*, p. 188 (2001)]. The plain meaning

of KRS 500.070(1) is that every element of the whole case must be proved beyond a reasonable doubt by the government.

One of the bedrock rules of interpretation is that the legislature that enacted KRS 532.025 in 1976 was aware of the language of KRS 500.070(1) which had been enacted in 1974. [1976 Kentucky Acts (Ex Sess), Ch. 15, §2; 1974 Kentucky Acts, Ch. 406, §6]. This rule is followed consistently in the recent opinions of the Court. [Cummings v. Commonwealth, 226 S. W. 3d 62, 67 (Ky., 2007); Osborne v. Commonwealth, 185 S. W. 3d 645, 649 (Ky., 2006)]. Thus, the Court is bound to proceed on the premise that the 1976 Special Session knew that KRS 500.070(1) would apply to every aspect of the proceeding established by KRS 532.025.

One aspect of the proceeding is the sentence to be imposed. The jury or the judge is to decide what kind of sentence is appropriate, beyond a reasonable doubt. This makes sense when the right to life is at stake. Constitution Section One details the inherent and inalienable right to enjoy life. The 1976 Extraordinary Session surely could have determined that the punishment of death is so severe that it can be imposed only when the sentencer is convinced beyond a reasonable doubt that death is the only appropriate penalty.

Thus the problem in this case is thrown into sharp relief. Judge McDonald nowhere states that KRS 500.070(1) was complied with. Rather, he appears to have engaged in some kind of balancing procedure in which defense counsel had to convince him that there was an "excuse" for the murders. The penalty cannot

be upheld under these circumstances. Appellant moves the Court to vacate the sentence and to remand with directions to grant a new sentencing procedure at which the whole law of the case will be followed.

(3). KRS 532.030(4) mandates submission of the sentence to a jury "in all cases." A judge cannot disregard this plain direction. Because jury sentencing is not a personal right, a defendant cannot waive it.

This issue is raised because sentencing was conducted exclusively by the circuit court judge. Everyone in the courtroom appeared to believe that the entry of a guilty plea somehow obviated the need to seat a jury for sentencing. But sentencing is jurisdictional. Thus, the procedures established by KRS 532.030(4) must be followed in every case without exception. [Cummings v. Commonwealth, 226 S. W. 3d 62, 66 (Ky., 2007)].

Appellant is aware of the holding in Chapman v. Commonwealth, 265 S. W. 3d 156, 177 (Ky., 2008), that appears to contradict his position. As Appellant will show, RCr 9.26 is superseded by KRS 532.030(4) and cannot be the basis of an attempted waiver of the right to jury sentencing. KRS 532.030(4) is not a statutory grant of a right that can be enforced or waived at the option of the parties and the circuit court. Rather, it is an integral and mandatory part of the special statutory proceeding adopted by the General Assembly for the imposition of death as a criminal penalty. The statute makes no provision for waiver. The Court must therefore conclude that none was intended.

The plain language of KRS 532.030(4) is simple and unambiguous: "[i]n all cases in which the death penalty may be authorized the judge shall instruct

the jury in accordance with subsection (1) of this section." Nothing in the remainder or Subsection (4) contemplates any death-eligible case in which a jury will not be instructed.

A jury must be instructed on penalty range "in all cases in which the death penalty may be authorized." The language makes no exception for guilty plea cases. The language makes no exception for "volunteer" cases. The invariable rule when no exceptions are made to the positive terms of a statute is that none were intended. [Commonwealth *ex rel* Cowan v. Wilkerson, 828 S. W. 2d 610, 614 (Ky., 1992)]. Thus, the plain language mandates instructions to juries in all death eligible cases. There is no other meaning attributable to this language.

Given the meaning of the statutory language, there is no legitimate way to get around jury sentencing. The Court of Justice must follow the procedures of a special statutory proceeding that it has agreed to employ. Civil Rule 1(2) recognizes that, in cases of conflict, the statute prevails over court rules. CR 1(2) acknowledges statutory primacy because Section 15 of the Constitution requires it. Section 15 reads: "No power to suspend laws shall be exercised unless by the General Assembly or its authority."

The Court of Justice cannot pick and choose which parts of a statutory scheme it will comply with. Doing so would amount to judicial suspension of the disregarded parts in violation of Section 15. Obviously, an Executive Branch lawyer like a Commonwealth's attorney cannot disregard the plain dictate of a statute. This would be executive suspension of the law. And because KRS

532.030(4) is a statutory mandate, not an offer of jury sentencing to those who desire it, a defendant cannot waive submission to the jury.

The record of this case shows that KRS 532.030(4) was not complied with. A judge imposed the sentences. The sentences of death resulting from the improper proceeding are invalid and must be vacated. The Court must remand for a new sentencing hearing before a properly instructed jury.

(4). By making the judge rather than the jury the final sentencer in death penalty cases, KRS 532.025 and KRS 532.030 violate Section 11 of the Constitution.

This issue is raised pursuant to RCr 8.18 because an unconstitutional statute cannot confer jurisdiction on a court. The enactment is void *ab initio* and can never be a legitimate basis for government action.

This Court, in Spanish Cove Sanitation, Inc. v. MSD, 72 S. W. 3d 918 (Ky., 2002), explained that unconstitutional statutes are void *ab intio* and that any act taken under the purported authority of an unconstitutional statute is a nullity. [p. 921]. This is a restatement of long standing principles. "All acts done under an unconstitutional law are void and of no effect." [International Harvester Co. v. Commonwealth, 170 Ky. 41, 185 S. W. 102, 103 (1916)]. It does not matter if the statute has been upheld in the past because a "statute which violates the Constitution is never effective for any purpose; it cannot be made constitutional by repeated violations of that instrument." [Barker v. Crum, 177 Ky. 637, 198 S. W. 211, 215 (1921)]. More to the point, a statute that is unconstitutional cannot confer jurisdiction on a court. [International Harvester, 185 S. W. at 103]. The

statute has no legal existence, from day one to the date on which it is condemned by a court. Thus, failure to raise the issue or to notify the Attorney General at the circuit court level cannot be interposed as a reason to deny review.

As demonstrated in the previous argument, the 1976 Extraordinary Session of the General Assembly anticipated that a jury will make at least the initial sentencing decision in all death eligible cases. However, the statutory scheme is flawed because it reduces the jury to an advisory role. Both KRS 532.030(4) and KRS 532.025(1)(b) and (3) authorize the jury to recommend a sentence. This is a violation of Section 11 of the Constitution which irrevocably assigns the final say as to all discretionary sentences to the criminal jury.

Because of pervasive training in federal constitutional law, most lawyers and judges initially think that Kentucky's Bill of Rights must perform the same function as the federal Bill of Rights. Typically, they think that a bill of rights must be a list of rights personal to the individual. And because the rights are personal, they are generally deemed subject to waiver by the person in whose favor they exist.

However, a closer look shows that, like many state bills of rights, the Kentucky Bill of Rights is a collection of individual rights and statements as to the powers of government. [G. Alan Tarr, *Understanding State Constitutions*, p. 11-12 (1998)]. Examination of Sections 1 to 26 of the Kentucky Constitution bears out this characterization. These sections reserve some individual rights, make

descriptive statements as to the purpose and operation of government, and state mandates to, and impose limitations on, the government.

This comprehensive nature is suggested first of all by the Preamble:

> That the great and essential principles of liberty and free government may be recognized and established, we declare that:

The plain language indicates that at least two types of provisions will be found in the Bill of Rights. Some will relate to principles of liberty. Some will relate principles of free government. The existence of both types is easily shown by a few examples.

Section 1 is a collection of the rights that all persons have as individuals. They are deemed inherent and inalienable and thus, perhaps, cannot be waived. The first sentence of Section 11 expressly identifies certain rights of the accused. Presumably, because these rights are personal to "the accused" they can be knowingly and voluntarily waived to suit the purpose of the person in whose favor they exist. The second sentence of Section 8 identifies an individual right to speak and write. But beyond these three sections, it is hard to characterize any other sections of the Bill of Rights as expressly reserving rights to individuals.

Certain other sections, like Sections 2, 3, 4 and 25 are declarations of principles of government. These sections explain the underlying structure of a free government. Under Section 2, a government cannot be arbitrary, even when the people demand arbitrariness. Special privileges cannot be doled out to favored individuals. Privileges must be earned by public service. [§3]. In

Kentucky, government exists to serve the people, not to rule over or proctor them like a monarch or parent. [§4]. Section 25 says that slavery is forbidden. Because the Constitution is to be read with the understanding that the drafters took great care to say exactly what they meant, [Fletcher v. Graham, 192 S. W. 3d 350, 358 (Ky., 2006)], Section 25 cannot be read as directed at the individual. A person cannot voluntarily become a slave by waiver of a right personal to himself because no such right exists. The status of slavery is forbidden and cannot be created or ratified by individual waiver.

Careful reading of the remainder of the Bill of Rights shows that these other sections are addressed to the government. They are mandates and prohibitions that direct or forbid certain government actions.

Appellant has already referred the Court to one example. Constitution Section 15 states that laws may not be suspended, except by the legislature or under its authority. This is a prohibition directed to the judicial and executive branches of government telling them that they cannot disregard statutes they do not like. An individual has nothing to do with this section because its sole function to advise the government of the conditions under which a statute can be suspended. The question of waiver never arises because the judicial and executive branches of government lack power to suspend laws in the first place.

In Section 6, the Constitution provides that "all elections shall be free and equal." Because "all" must be read to mean "all," Section 6 means that no agency of government can set up a system of cumulative or weighted voting to

suit its notions of policy. And of course, because this right is not addressed to an individual, neither the individual nor the people as a group can agree to a non-conforming election scheme.

To insure that the prohibitions and mandates that form the great majority of the Bill of Rights are obeyed, Section 26 declares any act in violation of the Bill of Rights to be void. Unconstitutional legislative acts cannot be ratified by other branches of government or by the people themselves, short of an amendment to the Constitution. Section 26 imposes a strict duty on the Court of Justice to make sure that all acts of government conform to the policies set out in the Bill of Rights. The Court must test the statutory capital punishment scheme by comparing its provisions to the limitations and mandates of Section 11 of the Bill of Rights.

Section 11 is a compound of individual rights and government restrictions. The first sentence is a list of rights held by an identifiable person. It states that in all criminal prosecutions

> "the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

The purpose of the first sentence of Section 11, obviously, is to state the rights personal to an accused in a criminal prosecution. Personal rights may be waived by the person in whose favor they exist.

A different audience is addressed in the second sentence of Section 11. This is indicated first of all by starting a new sentence. A sentence is "an independent grammatical unit that contains a subject and a predicate and expresses a complete thought." [Kirszner and Mandell, *The Holt Handbook, 2d Edition*, §7(a), p. 146 (1989)]. The first complete thought of Section 11 is about the rights of the accused. The second complete thought is a statement of what government can and cannot do. As to the "accused" the government is instructed that:

> "He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land;
>
> and in prosecutions by indictment or information, he shall have a speedy trial by an impartial jury of the vicinage;
>
> but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

As in other sections of the Bill of Rights, the language immediately above is a listing of what the government must or must not do. It is a description of how things must be in all cases.

Thus, for example, in cases of indictment or information, the government "shall" afford a speedy trial. This right is not a personal right that an individual accused can waive. Rather, it is a mandate to the government to proceed expeditiously when it has placed a citizen under the charge of a crime.

But of chief interest here is the language "nor can he be deprived of his life liberty or property unless by the judgment of his peers or the law of the land." Appellant has found only one case that construes this language, Cornelison v. Commonwealth, 84 Ky. 583, 2 S. W. 235 (1886). That case explains the language as follows:

> Under our State Constitution, neither the life nor the liberty of the citizen is made to depend, when charged with a crime, as to the extent of the punishment, upon the arbitrary will of the judge; but in all cases, when indicted for a criminal or penal offense, involving his life or liberty, or subjecting him to a fine, he is entitled to a trial by jury, and that tribunal must not only find him guilty, but also fix the punishment." [84 Ky at 597; 2 S. W. at 238].[1]

KRS 532.030(4) and KRS 532.025 limit the jury to a "recommendation" as to punishment. Under the plain language of those statutes, the sentencing jury serves the same purpose as an advisory jury in the old courts of equity. [Skaggs v. Commonwealth, 694 S. W. 2d 672, 679 (Ky., 1985)]. But under Section 11, the jury must be the final arbiter of the extent of punishment. This is part of the structure of government established by the Constitution that cannot be modified by the legislature [Constitution Section 26], or waived by the individual. Section 11 mandates jury sentencing in all cases in which the sentencer has discretion as to what the punishment will be.[2]

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[1] It is important to refer to the Kentucky Reports, the official reporter, as to this quotation. In the Kentucky Reports the phrase "State Constitution" is capitalized and singular. The Southwestern Reporter version, which is not official, has it lowercase and plural.

[2] Obviously, where the punishment is fixed by statute, there is no jury question because the punishment is applicable in all cases. The sentence then becomes a question of law for the judge.

The statutes are manifestly unconstitutional because they make the judge the final sentencer. The determination of judge or jury sentencing is not a matter of choice. Section 11 says that a person cannot be deprived of his life unless a jury says so. KRS 532.030(4) and KRS 532.025 are manifestly unconstitutional. Pursuant to Section 26 of the Constitution, they are void. The Judgment imposing two death sentences under these void statutes is erroneous and must be reversed.

(5). The Court may not conduct the statutory review mandated by KRS 532.075 until it has generated and reviewed a typewritten transcript of proceedings.

Because this is an issue arising under KRS 532.075, it was not raised in the circuit court. It is a matter of jurisdiction and therefore one to be noticed pursuant to RCr 8.18. It is related to Appellant's earlier motion for transcript, but raises the question of whether or not this Court can go forward with the review mandated by KRS 532.075. Appellant respectfully maintains that failure to comply with every requirement of KRS 532.075 precludes attachment of jurisdiction to make the assessment of arbitrariness essential to the statutory scheme.

It goes without saying that nothing like KRS 532.075 existed before the summer of 1976. [Kentucky Acts, 1976 Ex. Sess., Ch. 15, §6]. It is fair to describe KRS 532.075 as a remedy created primarily for the benefit of persons condemned to death in criminal cases. It is remedial because it was designed to correct a perceived defect in the former common and statute law. [KIGA v.

Jeffers, 13 S. W. 3d 606, 610 (Ky., 2000)]. The purpose, evident from the language used, is to provide for review by this Court to determine whether or not the sentence of death was arbitrary.

The Court has accepted KRS 532.075 as a legitimate exercise of the legislature's authority to say "when and if the death penalty shall be imposed," and "to prescribe the special type of review of punishment and errors . . ." when that penalty is imposed. [Cosby v. Commonwealth, 776 S. W. 2d 367, 369 (Ky., 1989)]. Thus, there is no separation of powers objection to following KRS 532.075 as written.

As with all remedial statutes, KRS 532.075 must be given "a liberal construction in favor of the remedy." [KRS 446.080(1); Jeffers, 13 S. W. 3d at 611]. This approach is undertaken because a remedial statute "has for its purpose the promotion of justice and the advancement of public welfare." [Jeffers, p. 610]. And as with all statutes of any type, the Court determines the nature and extent of the remedy by reading the plain language of the enactment. [Lach v. Man O'War, LLC, 256 S. W. 3d 563, 568 (Ky., 2008)].

KRS 532.075(1) unequivocally describes the record to be reviewed by the Court. The circuit clerk is ordered to "transmit the entire record and transcript to the Supreme Court." This clearly means the clerk's record of papers and exhibits together with a transcript of the proceedings. A transcript is a handwritten or typewritten record. [*American Heritage Dictionary, 4th Edition*, "transcribe; transcript," p. 1832 (2000)].

The legislature is presumed to know the state of the law at the time it acts. [Button v. Hikes, 296 Ky. 163, 176 S. W. 2d 112, 116 (1943); Lewis v. Jackson Energy Co-op Corporation, 189 S. W. 3d 87, 93 (Ky., 2005)]. When KRS 532.075 was enacted, the law only provided for written transcripts. There were no video records in the Court of Justice then, a fact of which this Court must take notice. [KRE 201(b)(2)]. Subsection (1) of KRS 532.075 says "transcript." It cannot mean a videotape of proceedings.

If the legislature's intent can be discerned from the words used, the Court "cannot base its interpretation on any other method or source." [Stopher v. Conliffe, 170 S. W. 3d 307, 309 (Ky., 2005)]. If there is any doubt as to the intent of the legislature, the Court must give the words the meaning they had at the time of enactment because courts construe statutes in light of the conditions existing at the time of enactment. [Sanitation District No. 1 v. Metropolitan Sewer District, 307 Ky. 422, 208 S. W. 2d 751, 754 (1948)]. Again, KRS 532.075(1) cannot be referring to a videotape when it speaks of a transcript.

This Court and its predecessor have disclaimed the power to modify the policy choices of the Legislative Branch. The Court of Justice does not claim the power to substitute its judgment for that of the legislature. [Fann v. McGuffey, 534 S. W. 2d 770, 779 (Ky., 1975); Mondie v. Commonwealth, 158 S. W. 3d 203, 208-209 (Ky., 2005)]. In this case, the legislature has enacted a statute that requires a transcript, that is, a written record of proceedings, for review by this Court. The exact words of Subsection (1) are "the sentence shall be reviewed on

the record." The "record" is to consist of the clerk's record and a transcript. This is the absolute minimum type of review that must take place in every death penalty case.

The transcript is essential to the remedy because KRS 532.075 anticipates an independent review of the record by this Court. This is evident in almost every subsection of the statute.

Subsection (1) unambiguously states that a final sentence of death "shall be reviewed on the record by the Supreme Court." Subsection (2) imposes a duty to "consider the punishment as well as any error enumerated by way of appeal." Even if an appellant does not raise the propriety of a death sentence in an appeal, or does not even bother to appeal, the Court is required to consider the appropriateness of death as a punishment. Subsection (3) specifies three areas of inquiry as to the propriety of the sentence. But the clinching argument is found in the second sentence of Subsection (5):

> In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> (a) Affirm the sentence of death; or
>
> (b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

Subsection (5) indicates that in addition to its inherent and statutory authority to correct errors (by reversing and remanding for new trial on the merits) the Court

has statutory authority to examine the sentence "on the record and argument of counsel." The Court has statutory authority to review the complete record and to vacate a sentence because the Court considers it too severe under the circumstances.

The General Assembly considers this additional level of review essential to a fair sentencing process in death penalty cases. It has set out the procedures and requirements and has not amended KRS 532.075 since July, 1976. If only for the sake of comity, the Court should follow the statute scrupulously to afford Appellant the complete remedy created by the legislature. Even more, the Court must follow its own policy by enforcing statutes to effect the intent of the legislature. The legislature has said a transcript. It has not authorized review of a videotape. For the remedy to be effected, the Court must generate a transcript and review it independently. Until it has done so, the Court should not rule on the propriety of the sentence.

If the Court rules on the sentence without reviewing a written transcript, it will deny Appellant a remedy that has been enjoyed by many, if not most, of the persons condemned to death since enactment of KRS 532.075 in 1976. The Court certainly may insist on a video record in a direct appeal because Sections 115 and 116 of the Constitution give it that right. But as to a proceeding under KRS 532.075, it has no authority to substitute video for transcription.

Fundamental considerations of equal protection of the laws under the 14th Amendment and under Sections 2 and 3 of the Kentucky Constitution require like

treatment for similarly situated individuals. Other condemned persons, because of the date of their conviction or venue in a non-video circuit, have had a transcript. Simple fairness demands one in Appellant's case.

(6). The Court must disregard the report of the trial judge as to the propriety of the sentences and his ruling on competency. In this case, the report would amount to a judge commenting on his own decisions.

This issue again falls under the Court's statutory jurisdiction authorized by KRS 532.075. Subsection (1) of the statute requires "a report prepared by the trial judge." The contents of the report are determined by this Court. One of the questions on the report is Number E-12 which asks for the "general comments" of the sentencing judge as to the propriety of the sentences imposed. The utility of this question in cases resolved by jury recommendations of death is clear. It affords the trial judge a final chance to advise of any second thoughts he or she might have about the sentence returned by a jury. But in a case like the present one, where the judge was the sole fact finder and sentencer, Question 12 amounts to a request for the sentencing judge's opinion as to the quality of his work. This opinion is unnecessary and should not be entertained.

Other questions, like B-13(b) and B-15, deal with perhaps the main issue at the circuit level, whether or not another competency hearing should have be held on July 17, 2006, the day on which the guilty plea was entered. The validity of this determination is discussed as Issue 1 in this Brief. The Court should not consider Judge McDonald's opinion on this issue.

(7). The Court should exercise its authority under KRS 532.075(5)(b) to vacate the sentence and remand the case for resentencing.

The second sentence of KRS 532.075(5) recognizes that the Court may reverse death sentences under its inherent [Constitution §110(2)] and statutory [KRS 532.075(2)] error correcting authority. The same sentence also grants authority to vacate a death sentence "in addition" to these bases of jurisdiction. Subsection(b) states that the Court may "[s]et the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel."

The statute obviously is talking about two forms of review. The first, based on "error," permits reversal and remand for correction of procedural and substantive errors. The second, granted in addition to the first, permits the Court to vacate the sentence and remand for a new sentencing. No limitation is stated as to grounds for vacation. The Court may do so if persuaded by its review of the record and the argument of counsel. Subsection (5) is a safety valve form of review that permits the Court to vacate a death sentence about which it feels unsettled. There are reasons to be uncomfortable about the sentences imposed in this case.

The government, from the very beginning of the prosecution refused to consider a plea bargain. On September 4, 2004, the prosecutor assigned to the case was quoted as saying that the government "will not make an offer on this case." (TR 31). No offer to settle was ever tendered despite the fact that nationwide nearly 95% of all felony cases are disposed of by plea bargain.

[Cohen, et al., *Criminal Procedure, Third Edition*, Ch. 11, §A, p. 353 (2008)]. No offer to settle was made despite the fact that trial counsel showed that similar cases did not invariably result in a death verdict. (TR 154). Although the aggravating circumstances were legally sufficient to invoke KRS 532.030, the government's refusal to even consider a bargain raises the question of arbitrariness.

Another reason to vacate arises from the difficulty in distinguishing between "death-eligible" and "death-worthy" cases. It is fair to characterize intentional murder in Kentucky as the purposeful killing of another human being without any excuse whatever. The text of KRS 507.020(1)(a) denounces murder as causing the death of another person "with intent to cause" death. "Intent" in this context means that the actor causes the death of another because "his conscious objective is to cause that result." [KRS 501.020(1)]. Extreme emotional disturbance can mitigate the offense. [KRS 507.020(1)(a)]. And most defenses to intent crimes can excuse or mitigate the offense of murder. [KRS Ch. 503]. But a person cannot be convicted of murder under KRS 507.020(1)(a) if any defense or mitigation factor is found. Thus, intentional murder in Kentucky is, literally, inexcusable.

In terms of moral culpability, intentional murder is utterly reprehensible. A person convicted of intentional murder has killed another person without any justification whatever. Yet under Kentucky's singular approach to homicide, the penalty range for the offense is 20-50 years or "straight" life imprisonment. It is

only when a statutory "aggravator" is found that death and enhanced life sentences are available. [KRS 532.030(1); KRS 532.025(3)].

When death is sought by the government, the Court of Justice is asked to conduct a proceeding at which a sentencer tries to determine how a person can be so significantly more culpable than an ordinary murderer that death or enhanced life sentences are justified. Essentially, a jury or judge is asked to determine that one inexcusable homicide is sufficiently different from another so that one murderer will serve an ordinary term of years and another will have his life extinguished by the state. This is an exercise in metaphysics beyond the abilities of Plato's philosopher kings. It surely is beyond the capacity of a jury or judge sitting in a single case, with no basis for comparison with other cases.

The need for comparison is recognized in KRS 532.075(5)(b). If the Court exercises its power to vacate a sentence, on remand it must send comparison information to the circuit judge "for his consideration." At the resentencing, the judge or jury will be able to look at similar cases selected by this Court and receive guidance from results in those cases. If comparison is important after reversal on appeal, it certainly is as important before the judgment is entered.

Appellant's case requires careful reconsideration, given the circumstances under which a plea was entered and the sentence imposed. As noted in Argument 2, it appears that Judge McDonald started out with the idea that he would have to hear evidence to excuse or mitigate the offense before death

could be excluded. There was ample reason to require a new competency determination on July 17th when the plea was entered.

As the Court has certainly inferred by now, Appellant no longer desires to be put to death. He is not Marco Chapman. At minimum he wishes to be resentenced pursuant to KRS 532.075(5)(b). Under all circumstances, the Court should exercise its statutory authority to set the sentence aside and remand for resentencing.

Conclusion

KRS 532.025 and KRS 532.030(4) are unconstitutional violations of Constitution §11, making the disposition of this appeal simple. Section 26 declares those statutes void. The case must be remanded to circuit court for a new sentencing hearing under KRS 532.055 at which the ordinary penalties for murder will be considered.

If the Court upholds the constitutionality of the statutes, the entire Judgment must be reversed and remanded because the guilty plea was taken under circumstances that demanded further inquiry into Appellant's competency to proceed. The Judgment must be reversed and the case remanded with directions to vacate the plea of guilt and to proceed to trial or other disposition on the Indictment.

Failing reversal of the entire Judgment, the Court must vacate the sentence for a number of reasons. The sentencing proceeding below excluded the jury participation required by KRS 532.030(4). The judge permitted a defendant of dubious competency to ask for death. The judge appeared to settle on death as the appropriate penalty absent a showing of mitigation to change his mind.

In any event, the Court may exercise its statutory jurisdiction under KRS 532.075(5) to vacate the sentence simply because the circumstances give rise to doubt as to its propriety.

If the Court grants any of the relief requested above, it will not be required to conduct a proportionality review. But if review becomes necessary, the Court must first generate a transcript to comply with KRS 532.075. And if the Court conducts a review, Appellant urges the Court to look outside the standard list of death penalty cases. Plea bargaining has changed the nature of criminal practice. Death cases represent a very small sample from which to determine proportionality. As shown by the motion filed by defense counsel, many death-eligible cases never get to the point of imposition of a sentence of death. Cases go to trial or don't go to trial for many reasons, family pressure to seek or avoid the death penalty, the personality of the county's Commonwealth's Attorney and the mental state of the defendant. The Court currently compares only those who received death. It does not, as far as can be determined, consider the many equally egregious cases that never got beyond a guilty plea to unenhanced penalties. These should be considered to avoid true arbitrariness.

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