Commonwealth of Kentucky
Supreme Court
No. 08-SC-383

SHAWN WINDSOR — **APPELLANT**

v.

Appeal from JeffersonCircuit Court
Hon. Martin McDonald, Judge
Indictment No. 04-CR-000001

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 delivered this 18th day of March, 2009, via U.S.mail, postage prepaid, to Hon. Martin McDonald, Judge, Jefferson Circuit Court, Division 6, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; Hon. J. David Niehaus, Office of the Louisville Metro Public Defender, 200 Advocacy Plaza, 719 W. Jefferson Street, Louisville, Kentucky 40202; via electronic mail to Hon. David Stengel, Commonwealth's Attorney, 514 West Liberty, Louisville, Kentucky, 40202.

Hays Lawson
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INTRODUCTION

Appellant appeals as a matter of right from a judgment on a guilty plea finding him guilty of two Counts of Capital Murder and sentencing him to death for each count. Appellant was also convicted of theft by unlawful taking over three hundred dollars and violating a protective order.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth agrees with Appellant that oral argument under KRS 532.075 is appropriate in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth does not accept Appellant's statement of the case and sets forth the following counterstatement below:

On December 28, 2003, Appellant, Shawn Windsor, murdered his 27-year-old wife and eight-year-old son by stabbing them with a steak knife and beating them to death with a dumbell. TR Vol. III at 445. The record in this case gives precious little other details or context to this senseless and exceedingly brutal crime. Appellant certainly gave none in the *Boykin* hearing on his guilty plea when he admitted in a single sentence that he bludgeoned his wife and son to death. VR-3; 7/17/06 at 11:52:09-30. The victim impact statements provide some texture to the lives ended by Windsor and give terrible truth to the John Greenleaf Whittier quote that "[f]or of all sad words of tongue or pen, the saddest are '[what] might have been.'" The statements and testimony give a fleeting glimpse of Betty Jean Windsor as beautiful person both physically and spiritually. And they reveal that Corey Windsor was a true innocent in the way that only small children can be. It's impossible to imagine the horror and confusion Corey must have gone through in the last moments of his life as his father attacked him and his mother.

The one living person who bore witness to these tragic events apparently came to appreciate their weight and devastating effect. In explaining why he was pleading guilty and asking to be sentenced to death, Appellant stated, "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 at 11:31:50. In connection with this request, Appellant asked to be sentenced to death and waive the right to introduce mitigating evidence. This set into a place a series of unusual events, all of which the trial judge addressed in an appropriate, thoughtful, and fair manner in order to protect Appellant's rights and the integrity of the judicial process itself.

Accepting the Guilty Plea: the *Boykin* Hearing

On July 7, 2006 the trial judge held a *Boykin*[1] hearing to determine whether to accept Appellant's guilty plea and to further to determine whether that plea was voluntarily, knowingly, and intelligently made. Appellant was sworn and asked a series of questions. VR-3; 7/17/06 at 11:48:00-12:00:00.

The trial judge first asked Appellant some general questions about his personal history, including his schooling and previous employment. *Id.* at 11:48:20-11:49:40. When it came to light that Appellant had not graduated high school, the trial judge became concerned about Appellant's ability to read and write. The judge sought and received assurances from Appellant that he could indeed read and write. *Id.* at 11:49:00-10. Next, Appellant acknowledged his identity as to the indictment. Id. at 11:49:40-50.

After noting the court's recent finding of competency, the trial judge acknowledged the possibility of some lingering concerns regarding Appellant's mental health. To further assure the court that there were no competency issues, the trial judge asked Appellant a series of questions concerning his health, prior counseling, and current medication and drug use. *Id.* at 11:50:00-51:00. The trial judge next went over the facts of the case, including the facts supporting he aggravating factors in the case. Appellant fully and freely confessed his culpability to the crimes as outlined in the indictment. *Id.* at 11:51:00-11:52:30.

The trial judge then carefully and thoroughly went over Appellant's legal rights that he would be waiving by pleading guilty, including, but not limited to:

- Confirming that Appellant's guilty plea was against the advice of counsel;

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[1] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709(1969).

- Explaining to Appellant that he had the right to a trial by jury and to be sentenced by a jury.

- Explaining to Appellant the possible punishments: Death, Life without the possibility of parole, Life without the possibility of parole for 25 years, Life, and a term of years;

- Explaining to Appellant that he had the right to testify on his own behalf, the right to cross-examine witnesses against him, and the right to compel witnesses to testify on his behalf;

- Explaining to Appellant that he was presumed innocent of the charges against him and that the Commonwealth had the burden of proving beyond a reasonable doubt each and every element of the offenses; and

- Explaining to Appellant that he had the right to an appeal and appointment of appellate counsel if he could not afford to pay for counsel.

At each step, Appellant acknowledged that he understood his rights. The trial judge then reinforced that the purpose of going over Appellant's legal rights was to make certain that Appellant was aware of the rights he would be giving up by pleading guilty. He then went over Appellant's legal rights again. And again, Appellant stated that he understood those rights. *Id.* at 11:52:30-11:57:00. The trial judge then made sure that Appellant's decision to plead guilty was not the product of coercion or promises. Satisfied with Appellant's responses, the trial judge asked Appellant, when considering all of the rights he was giving up by pleading guilty, did Appellant still wish to plead guilty. Appellant affirmed that this was so. *Id.* 11:57:00-58:45.

Appellant then plead guilty to two counts of murder, one count of theft by unlawful taking, and one count of violating a protective order. *Id.* at 11:58:45-11:59:50. The trial judge accepted the plea and made a finding on the record that Appellant's plea was knowingly, voluntarily, and intelligently made. The trial judge also found that there was a factual basis for the charges, which included the charges supporting the aggravating factors. *Id.* at 12:17:00-18:00.

At the conclusion of the hearing, Appellant asked to waive final sentencing and to be sentenced immediately. The trial judge wisely denied the request, telling Appellant, "I want to give you some time to think about this." *Id.* at 12:19:00-20.

Waiving Mitigation: The *St. Clair* Hearing

As the trial judge acknowledged, he was faced with a very unique situation. He was faced with a defendant who wanted to plead guilty to capital murder and, as part of that plea, waive the introduction of mitigating evidenced and be sentenced to death. This was in late 2006, which was over a year before the Court rendered *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007). The trial judge had no case law to turn to for guidance, at least none that was presented by either counsel. Rather, all concerned turned to *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), primarily on the issue of Appellant's decision to waive the presentation of mitigation evidence. Accordingly, the trial judge held an *ex parte* hearing in which, presumably, defense counsel summarized the mitigation evidence for the trial judge, and the trial judge assured the court that Appellant's waiver of the presentation of mitigation evidence was knowing, voluntary, and intelligent.

The *ex parte* hearing does not appear to be part of the appellate record. The Commonwealth has moved the Court to supplement the record with the *ex parte* hearing tape and to unseal the tape in order to make the record as complete as possible.[2] The trial judge did issue an Opinion and Order, TR Vol. IV at 506-08, which concludes as follows:

[2]In light of the trial court's decision to allow defense counsel to present mitigation evidence at the sentencing hearing and that the *St. Clair* hearing is not an issue on appeal, the Commonwealth does not believe that a copy of this hearing is necessary to complete its brief.

> The Court finds that the Defendant has a clear understanding of the nature and purpose of mitigating evidence and his right to present such evidence and that the Defendant's waiver of the right to present mitigating evidence is knowing and voluntary.

Id. at 508.

The Sentencing Hearing

Having found Appellant competent and accepting Appellant's guilty plea, the trial judge scheduled and held a sentencing hearing, which lasted two days. As summarized by the trial judge:

> [t]he Court heard evidence offered in mitigation by counsel for the Defendant. Counsel for the Defendant prepared two volumes of evidence, in excess of 1400 pages, which they submitted to the Court at the conclusion of the two-day sentencing hearing. In addition, the Court heard testimony from the defense experts, Dr. Dennis Wagner, a licensed psychologist, and Dr. Walter Butler, a lawyer and psychiatrist. Counsel for the Defendant also called Susan Kleinholter as a mitigation specialist. The Court heard from the Commonwealth' expert, Dr. Larry Curl.
>
> Dr. Wagner's report indicates that the Defendant "appears to have a Personality Disorder, Not Otherwise Specified, with Narcissistic, Compulsive and Antisocial Features." Dr. Wagner's report also reflects his opinion that the Defendant "is not really impaired" and is "competent to stand trial." Dr. Wagner also testified that the Defendant came from a very unstable background and that his mother reportedly suffered from bipolar disorder. Dr. Wagner testified that, given Windsor's personality traits, violence could be expected but not necessarily homicidal violence.
>
> Dr. Butler's report stated that Windsor was raised in a "violent and abusive household" and described the Defendant's childhood as "chaotic" and "tumultuous." Dr. Butler's report concurred with Dr. Wagner's in that he believes that Windsor exhibits "significant antisocial and narcissistic personality" traits and not suffering from any psychiatric diseases or "any kind of significant mood disorder." Dr. Butler's report states that Windsor's

> "dysfunctional upbringing" and "personality pathology cannot be an excuse for any of his violent behavior." Dr. Butler's report indicates that the sources and causes of Windor's "dysfunctional upbringing" and "personality pathology cannot be an excuse for any of his violent behavior." Dr. Butler's report indicates that the sources and causes of Windsor's "personality pathology could ultimately give rise to such an explosive outburst of rage and violence that is at issue in this case."
>
> Susan Klienholter testified regarding the numerous references to Windsor's mother's alleged mental health problems and to the fact that there was significant contact with the Cabinet for Families and Children . . . throughout Windsor's childhood. She referred to many records regarding Windsor's difficult family situation and at least three occasions when a therapist or social worker recommended that Windsor be removed from the home.
>
> The Commonwealth's expert, Dr. Curl, concurred with Dr. Wagner's diagnosis of Personality Disorder, Not Otherwise Specified. He explained that diagnosis as meaning that Windsor's personality traits do not fit within the diagnosis of any one personality disorder. Dr. Curl testified that a dysfunctional upbringing such as Windsor's does not excuse homicide.
>
> Throughout the two-day hearing, the Court permitted the Defendant to comment on the testimony of each witness. He continued to state that he thought it was a waste of time because he accepted responsibility for his actions and he did not think it was appropriate to blame his actions on his mother or his childhood. He also maintained throughout the hearing that he thought his childhood was fairly typical and that he thought his mother had done the best that she could do as a single parent. Windsor reaffirmed his request for imposition of the death penalty during the mitigation hearing.

TR Vol. IV at 576-78.

After the two-day hearing, the trial judge took Appellant's sentencing under submission and entered an Opinion and Order about three weeks later, which sentenced Appellant to death for the murder of his wife, to death for the murder of his son, five years in prison for the theft by

unlawful taking over $300.00, and 12 months in prison for violating a valid protective order. *Id.* at 578-79.

ARGUMENT

I.

NO SECOND COMPETENCY HEARING WAS REQUIRED

"Once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question." *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999) (citing *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908 (1975); *Pate v. Robinson*, 383 U.S. 375, 385 86, 86 S.Ct. 836, 842, (1966)). The question raised here is simply whether Appellant's decision to plead guilty and to ask for the death penalty were sufficient facts in and of themselves to require the trial judge to order a second competency hearing. The record reveals that the answer is an unqualified "NO."

A. Facts Giving Rise to the July 13, 2006 Competency Hearing

Trial in this case was scheduled for July 7, 2006. TR Vol. I at 115; VR-3; 07/07/06 at 11:26:00. After Appellant attempted to commit suicide on July 7, 2006, the trial judge immediately recognized this as a fact that called into question Appellant's competency to stand trial. The trial judge issued a number of *sua sponte* orders concerning Appellant's competency. TR Vol. III at 352-57, 359-60. In response to the Commonwealth's motion, the trial judge ordered that Appellant be evaluated for competency to stand trial. *Id.* at 358. A competency hearing was held on July 13, 2006. VR-3; 07/13/09 at 14:16:00-15:00:00. Appellant was present at the hearing, though he was not questioned on the record, Rather, Dr. Tim Allen and Dr. Walter

Butler testified.

Both Dr. Allen and Dr. Butler interviewed Appellant on the day of the competency hearing prior to the hearing. But they reached opposite conclusions.

Dr. Allen is a psychiatrist at the Kentucky Correctional Psychiatric Center and an associate professor of psychiatry at the University of Kentucky. *Id.* at 14:17:35-45. Dr. Allen concluded that Appellant was competent to stand trial. *Id.* at 14:21:55-22:15. Dr. Butler, a psychiatrist at Louisville Behavioral Health Systems, *id.* at 14:35:50-36:30, concluded that in the wake of residual effects from Appellant's attempted overdose, he was not competent to testify. *Id.* at 14:47:00-20.

After reviewing the testimony from both doctors, the trial judge found that Appellant was competent to stand trial. VR-3; 7/14/06 at 10:19:30-20:10. Appellant does not challenge this ruling of competency. Rather, Appellant argues that his decision to plead guilty and ask for the death penalty are "facts" that placed Appellant's competence to stand trial at issue such that the trial judge should have conducted a second competency hearing. This is made clear in Appellant's motion to stay: "Based upon Defendant asking for his own death, the status of the Defendant's competency has shifted yet again–Although the Court found Mr. Windsor competent only days ago, that finding is not dispositive in light of this more recent development." TR Vol. III at 382, ¶¶5-6. The record does not support this assertion.

B. The Decision to Plead Guilty and Ask for Death does not Create a Presumption of Incompetence

Appellant argues that his decision to plead guilty and to ask to be sentenced to death created a question of incompetency that required a competency hearing. This Court

recently rejected a remarkably similar argument in *Chapman v. Commonwealth*, 265 S.W.3d 156, 175 (Ky. 2007):

> Chapman contends that a defendant who seeks to receive the death penalty is inherently incompetent. Chapman argues that we should adopt the Arkansas position that a defendant may not waive a jury trial on the issue of sentencing or guilt in a capital case because a defendant who seeks to waive those constitutional protections and seeks his own execution simply has not voluntarily and intelligently waived his rights. We disagree.

Id. at 175 (footnotes omitted).

In explaining this holding, the *Chapman* Court stated:

> in Kentucky, the death penalty is a constitutionally permissible punishment for certain capital offenses. And there is certainly nothing inherently unconstitutional about a person deciding to take responsibility for his or her criminal misconduct without having first undergone a full blown trial. Adhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant. Therefore, we hold that a competent criminal defendant is entitled to seek to plead guilty to a capital offense and, furthermore, to seek to receive the death penalty. **Thus, we reject Chapman's argument that the state's overriding interest in assuring that the death penalty is meted out in a constitutionally permissible manner invariably overrides a defendant's right to accept criminal responsibility for his past misconduct.** The safeguards contained in this opinion for a defendant who pleads guilty to a capital offense in order to seek the death penalty such as ensuring that the defendant is competent, that a factual basis exists to support the imposition of the death penalty, and our proportionality review amply protect the state's interests. Indeed, the rights of citizens of a free society to make these types of choices concerning their own future are essential to the proper functioning of society as a whole, as well as our system of criminal justice.

Id. at 175-76 (emphasis added and footnotes omitted).

The *Chapman* Court's respect for a "defendant's right to accept criminal responsibility for his past misconduct" is particularly germane to this case. At the beginning of the guilty-plea hearing, Appellant stated, "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 at 11:31:50-55. Appellant repeated this reason later in response to the trial judge's direct question as to why he was pleading guilty. He unequivocally declared that he wanted to plead guilty because he was "accepting responsibility for the acts . . . I committed." Id. at 11:58:05-20. As for the acts themselves, in Appellant's own words, he confessed, "I took the life of my wife and son . . . by bludgeoning them . . . with a dumbbell." Id. at 11:52:09-30.

Appellant's crime is incomprehensible. Appellant's burden in living with knowledge of having committed these atrocious acts is likewise incomprehensible. But the desire to confess is not. It is common. It is human. It may be the only display of Appellant's humanity that is comprehensible in this case. As such, Appellant's decision to take responsibility for this most terrible of crimes cannot be gainsaid as the product of incompetence.

"To be competent to plead guilty, a defendant must have 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.'" *Thompson v. Commonwealth*, 147 S.W.3d 22, 32 (Ky. 2004) (quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789, (1960)). The record, including the competency hearing and Appellant's own actions and words, clearly establish that he was competent to plead guilty. *See e.g.*, *Chapman*, 265 S.W.3d at 174 (holding that "a competency determination is based on the preponderance of

the evidence standard," which may only be disturbed "if the trial court's decision is clearly erroneous (*i.e.*, not supported by substantial evidence)").

Prior to the *Boykin* hearing on Appellant's guilty plea, defense counsel again challenged Appellant's competency. The trial judge reiterated his finding competency: "He is competent. I found him competent. I haven't heard anything to change my mind." VR-3; 7/17/06 at 11:33:45-55. The trial judge's competency ruling more than meets the preponderance of the evidence standard. There was no abuse of discretion in refusing to hold a competency hearing in light of Appellant's decision to plead guilty and to ask for the death penalty.

II.

KRS 532.025 DOES NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT THAT DEATH IS AN APPROPRIATE SENTENCE

Because Appellant's argument on this issue is not particularly clear, at least to undersigned counsel, the Commonwealth will begin with its understanding of the argument for the convenience of the Court.

Appellant argues that "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." Appellant's brief at 15. So Appellant's argument appears to be that the Commonwealth bears the burden of proving beyond a reasonable doubt that death is an appropriate sentence. This argument is based on faulty statutory construction.

Appellant claims that KRS 500.070(1) requires the Commonwealth to prove that death is an appropriate sentence because the statute places the burden on the Commonwealth of "proving every element of the case beyond a reasonable doubt." Appellant argues that "case"

includes the "punishment to be imposed." Thus, Appellant argues that his sentence must be reversed because the trial judge failed to find beyond a reasonable doubt that death was the appropriate punishment in this case. Without expressly saying so, Appellant argues that imposition of the death penalty requires a finding beyond a reasonable doubt that aggravating factors outweigh mitigating factors. This is clearly contrary to the law of the Commonwealth.

Under Kentucky law, a "jury is not required to weigh mitigating factors against aggravating factors." *Mills v. Commonwealth*, 996 S.W.2d 473, 493 (Ky. 1999) (citing *Bowling v. Commonwealth*, 942 S.W.2d 293, 306 (Ky. 1997)). And "[l]ike a jury, the trial judge is entitled to weigh all of the factors which he is required to consider. . . . [The] judge may give more weight to some factors than to others, and no weight at all to those which he believes are entitled to none." *Tamme v. Commonwealth*, 973 S.W.2d 13, 39-40 (Ky. 1998). In other words, Kentucky is a non-weighing state. *Hodge v. Haeberlin*, 2006 WL 1895526 at 70 (E.D.Ky. 2006).

As explained in Corpus Juris Secundum, in "'nonweighing' states, the sentencer may, in determining the sentence to be imposed, consider factors different from, or in addition to, the factors specified in the statute to determine the defendant's eligibility for the death penalty." 24 C.J.S. *Criminal Law* § 2124; *see also Tamme*, 973 S.W.2d at 40 (holding a trial judge "may consider a defendant's lack of remorse as a nonstatutory aggravator"). So Appellant's argument is contrary to case law and authority on the weighing issue. It's also contrary to the plain language of KRS 532.025.

KRS 532.025 provides in pertinent part:

> (1)(a) Upon conviction of a defendant in cases where the death penalty may be imposed, a hearing shall be conducted. In such hearing, the judge shall hear additional evidence in extenuation,

mitigation, and aggravation of punishment. . . . The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. . . . **In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in subsection (2) of this section.** Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence within the limits prescribed by law.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. . . . Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and **the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in subsection (2) of this section, exist and to recommend a sentence for the defendant.** Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(2) In all cases of offenses for which the death penalty may be authorized, **the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law** and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence . . . .

(3) . . . . The jury, if its verdict be a recommendation of death, or imprisonment for life without benefit of probation or parole, or imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty five (25) years of his sentence, **shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases, the judge shall make such designation.** In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty, or imprisonment for life without benefit of probation or parole, or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty five (25) years of his sentence, shall not be imposed

(Emphasis added).

So under the statute, the jury determines the existence of aggravating and mitigating circumstances and considers them when recommending a sentence. In a case tried without a jury, the trial judge must also consider the aggravating and mitigating circumstances when imposing sentence. Before a defendant may be sentenced to death, the jury—or the judge in a case tried without a jury—must find the existence of an enumerated aggravating factor beyond a reasonable doubt. Conspicuously absent in the statute is any requirement that the jury or the trial judge must consider or weigh aggravating and mitigating circumstances in any particular way or according to any burden of proof. Certainly, the statute contains no requirement that either the jury or the trial judge in a case tried without a jury find beyond a reasonable doubt that death is an appropriate penalty.

The requirement that an enumerated aggravating factor must be found beyond a reasonable doubt before the death penalty may be imposed demonstrates that the General Assembly was aware of burdens of proof when it drafted the statute. Thus, the absence of any burden of proof as to the consideration of aggravating and mitigating factors strongly implies that the General Assembly did not intend that the decision to impose death be subject to any set burden of proof. Rather, the statute gives the jury discretion as to the appropriate sentence. Moreover, the jury's discretion under the statute meets the Eighth Amendment's requirement that "as to the imposition the death where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932 (1976) (upholding the constitutionality of Georgia's death penalty statute); see *McQueen v. Scroggy*, 99 F.3d 1302, 1333 (6th Cir. 1996) overruled on other grounds *In re Abdur'Rahman*, 392 F.3d 174, 182 (6th Cir. 2004) (holding that Kentucky's death penalty statute, which is modeled after the Georgia death penalty statute, is constitutional).

Appellant's contrary argument that the statute does not provide limited and directed discretion in sentencing but, rather, requires a finding beyond a reasonable doubt that death is an appropriate sentence is simply wrong. No case law supports Appellant's construction of KRS 500.700(1). Indeed, the construction is directly contrary to existing case law.

If the Commonwealth bore the burden of proving beyond a reasonable doubt that death is an appropriate sentence, then failure to meet that burden would create double jeopardy concerns. As a result, failure to "prove" that death was an appropriate sentence would prohibit death as a possible sentence upon retrial. This result is directly contrary to the holdings of *Salinas v. Payne*, 169 S.W.3d 536 (Ky. 2005); and *Commonwealth v. Eldred*, 973 S.W.2d 43 (Ky. 1998).

Payne holds that

> An "implied acquittal" of the death penalty occurs only where the jury or reviewing court affirmatively finds that the Commonwealth has failed to prove the existence of an aggravating circumstance. If the jury has found that evidence of an aggravating circumstance was proven beyond a reasonable doubt, but nonetheless imposes a sentence of less than death, the Commonwealth simply cannot be precluded on double jeopardy grounds from seeking the full range of penalties, including death, on retrial.

Payne, 169 S.W.3d at 539; accord *Eldred*, 973 S.W.2d at 48.

Requiring the Commonwealth to prove beyond a reasonable doubt that the death

penalty is an appropriate penalty necessarily operates as an implied acquittal of the death penalty, because this failure would mean that the Commonwealth had "not proved its case" in the sentencing hearing. *Bullington v. Missouri*, 451 U.S. 430, 443, 101 S.Ct. 1852, 1860 (1981) (holding that under Missouri's capital-sentencing scheme, a sentence other than death operates as an implied acquittal of the death penalty). This Court carefully distinguished *Bullington* in *Eldred*:

> Thus, we can only conclude that the death penalty has not been exorcised from the general rule, which was first laid down in *Stroud*,[3] that the imposition of a lesser sentence does not prevent the prosecution from seeking a higher sentence at retrial. Therefore, we find no constitutional distinction between death and all the other possible sentencing options available to a jury in the penalty phase of a capital trial in Kentucky. Accordingly, because death is only one of many possible punishments for the jury to consider during the penalty phase of a capital trial in Kentucky, we find that the implied acquittal exception of *Green*[4] does not apply to Kentucky's capital sentencing procedure set out in KRS 532.025.

Eldred, 973 S.W.2d at 48 49.

Not only does Appellant's argument require reversal of *Payne* and *Eldred*, it also means that the imposition of a particular sentence in any trial acts as an implied acquittal of any higher sentence. This result flows directly from Appellant's argument that the phrase "every element of the case" as used in KRS 500.070(1) "applies to every element of the case, including the punishment to be imposed." *Appellant's brief* at 14 (emphasis in original). So a direct

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[3] *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), which holds that the Double Jeopardy Clause does not prevent a defendant whose conviction is reversed from receiving a more severe sentence upon retrial than he received at his first trial.

[4] *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), which holds that conviction of a lesser-included offense operates as an implied acquittal of the greater offense.

consequence of Appellant's argument is that the Commonwealth would bear the burden of proving beyond a reasonable doubt that every punishment in every case is appropriate. *Eldred* rejected this argument out of hand. *Eldred*, 973 S.W.2d at 48. And such a result is directly contrary to the holding of *Bruce v. Commonwealth*, 465 S.W.2d 60, 62 (Ky. 1971). Like in *Eldred*, the Court should reject Appellant's argument out of hand.

III.

A TRIAL COURT MAY CONDUCT A CAPITAL SENTENCING HEARING WITHOUT A JURY

KRS 532.025 authorizes "judge sentencing." *Bevins v. Commonwealth*, 712 S.W.2d 932, 934 (Ky. 1986). And *Chapman* directly holds that a capital defendant may waive jury sentencing. Chapman, 265 S.W.3d at 182. Undeterred by either of these cases, Appellant gamely argues that KRS 532.030(4) "mandates instructions to juries in all death eligible cases." *Appellant's brief* at 17. The Commonwealth respectfully disagrees with Appellant's statutory construction.

"Under the doctrine of in *pari materia*, statutes having a common purpose or subject matter must be construed together." *Commonwealth v. O'Bryan*, 97 S.W.3d 454, 456 (Ky. App. 2003). Without a doubt, the statutes in KRS Chapter 532 have a common purpose and subject matter. This is particularly true with the statutes in the Chapter relating to capital punishment, many of which were introduced or amended in 1976 Ky. Acts. ex. s. chpt. 15 (titled "AN ACT relating to capital punishment"). So KRS 532.030 must be construed in conjunction with KRS 532.025, which clearly and plainly provides for both trial and sentencing by a judge without a jury in capital cases. Thus, the most reasonable construction of KRS 532.030 is that the

statute is applicable to cases tried with a jury and simply has no application to capital cases tried without a jury.

IV.

JURY TRIALS ARE WAIVEABLE IN CRIMINAL CASES

Appellant argues that Section 11 forbids trying a criminal defendant without a jury trial. In other words, Appellant argues that a jury trial is a structural component of government rather than a personal right, and thus, not subject to waiver. Again, this argument challenges the great weight of authority to the contrary: "This court is of the opinion that there is nothing in the Kentucky Constitution which denies an accused the right to waive a jury trial." *Short v. Commonwealth*, 519 S.W.2d 828, 832 (Ky. 1975); *accord Jackson v. Commonwealth*, 113 S.W.3d 128, 131 (Ky. 2003).

Historically and precedentially, the right to a jury trial in criminal cases is found in Section 7 of the Kentucky Constitution, which provides:

> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution.

See e.g., *Jackson*, 113 S.W.3d at 131.[5]

That Section 11 provides that the accused "shall have a speedy public trial by an impartial jury of the vicinage" only serves to emphasize the importance of trial by jury. The

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[5] Both the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed," and Section 7 of the Kentucky Constitution, which provides that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate," guarantee a criminal defendant the right to trial by jury. *Jackson*, 113 S.W.3d at 131.

Section does not alter the personal nature of the right.

Similar to Kentucky Constitution, the U.S. Constitution contains two provisions relating to trial by jury. Article 3, s 2, cl. 3, provides in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." These two provisions correspond respectively and rather neatly with Section 11 and Section of 7 the Kentucky Constitution. That is, Article 3, s 2, cl. 3 of the U.S. Constitution and Section 11 of the Kentucky Constitution *could* be read as providing that jury trials are part of the frame or structure of government, whereas both the Sixth Amendment and Section 7 provide that a jury trial is a personal right, which can be waived by the holder of the right.

In 1930, the U.S. Supreme Court resolved this apparent conflict in the U.S. Constitution in favor of waiver. *Patton v. U.S.*, 281 U.S. 276, 312, 50 S.Ct. 253, 263 (1930). *Short's* unequivocal declaration that there is "**nothing** in the Kentucky Constitution which denies an accused the right to waive a jury trial" likewise resolves any conflict between Sections 11 and 7 in favor of waiver. *Short*, 519 S.W.2d at 832 (emphasis added). Therefore, waiver of a jury trial does not violate the Kentucky Constitution anymore than it violates the U.S. Constitution.

Should the Court be at all inclined to abandon *stare decisis* and to invite chaos into the criminal justice system by invalidating guilty pleas in both felony and misdemeanor cases as well as holding that the right to a speedy trial is no longer waivable, then the Commonwealth notes that *Patton* contains a very exhaustive analysis on the question of whether a jury trial is personal right or a frame of government. The reasoning and analysis in *Patton*

applies with equal force here. And under *Patton*, the right to a jury trial is personal and may be waived by a criminal defendant. *Patton*, 281 U.S. at 312. The Court should construe the Kentucky Constitution as likewise as providing that the right to a jury trial is a personal right that may be waived by a criminal defendant.

V.

A TRANSCRIPT IS NOT A JURISDICTIONAL REQUIREMENT OF APPELLATE REVIEW

Appellant argues that until and unless the Jefferson Circuit Court Clerk prepares and forwards a written transcript of the proceedings in this case, this Court may not review this appeal. That is, Appellant argues that under KRS 532.075 a written transcript is a jurisdictional requirement to appellate review. But this Court's jurisdiction of this case is not dependent on either statute or rule. Rather, this Court has inherent jurisdiction over this case under Section 110 to the Kentucky Constitution.

Section 110(b) provides:

> Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

Not only does Section 110 invest this Court with jurisdiction, it also provides that this Court's jurisdiction is otherwise determined by the Court's *rules*. Conspicuously absent in Section 110 is any reference to statute. Compare Section 110 to Section 113, which provides that "[t]he district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly." Thus, it is very clear that the General Assembly

cannot deny or alter this Court's jurisdiction through the enactment of a statute. *See e.g.*, *Thomas v. Lyons*, 586 S.W.2d 711, 716 (Ky. 1979) (holding that "[t]o the extent that KRS 118.176(4) provides that the action of the Court of Appeals shall be final runs athwart Const. Sec. 110(2)(b), which authorizes the Supreme Court to exercise appellate jurisdiction as provided by its rules"). Appellant's jurisdiction argument likewise runs athwart Section 110 and cannot stand. But the Court need not reach the constitutional issue because Appellant's construction of the statute as making a transcript a jurisdictional requirement is incorrect.

KRS 532.075(1) provides in pertinent part:

> Whenever the death penalty is imposed for a capital offense, and upon the judgment becoming final in the Circuit Court, the sentence shall be reviewed on the record by the Supreme Court. The circuit clerk, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge.

Nowhere does the statute require that a transcript must be prepared. Rather, the statute provides that the entire record and transcript must be transmitted to this Court. If there is no transcript, then obviously no transcript exists for transmittal. Moreover, the statute does not require the Court to review *a transcript*. Rather it requires the Court to review *the record*. By rule, the video recordings of the underlying proceedings constitution the official record on appeal in this case. *See* CR 98(3) (providing that "[t]he official video recordings, together with the clerk's written record, shall constitute the entire original record on appeal"). While the Commonwealth certainly believes that a written transcript would facilitate appellate review, this is something best done through rule making rather than statutory manipulation.

The most reasonable construction of the statute is that it requires transmittal of a

transcript to this Court in death cases when a transcript does in fact exist. But it does not require the preparation of a transcript.

VI.

THE TRIAL JUDGE'S REPORT COMPLIES WITH KRS 532.075(1)

Appellant asks this Court to disregard the trial court's report required by KRS 532.075(1). The report is required by statute. It would have been error for the trial judge not to make the report and to include it in the record. In light of this requirement and the report's purpose, the Court should deny Appellant's request.

As explained by this Court,

> [t]he purpose of the report is to insure that the trial judge based his decision to impose the ultimate penalty on relevant factors supported by the evidence and his personal observations during the course of the trial. In other words, its purpose is to provide further assurance that the death penalty was not arbitrarily or capriciously imposed

Tamme v. Commonwealth, 973 S.W.2d 13, 39 40 (Ky. 1998). The Commonwealth trusts that this Court can and may review the report and consider it for the purposes for which it was created.

VII.

THERE ARE NO GROUNDS FOR VACATING APPELLANT'S SENTENCE

This argument contains a birdshot of arguments. First, Appellant argues that the Commonwealth's failure to consider a plea with a sentence other than death raises the question of arbitrariness. In rejecting the same or a very similar argument, this Court in *Moore v.*

Commonwealth, 983 S.W.2d 479 (Ky. 1998) held: "Prosecutors have broad discretion regarding what crime to charge, what penalty to seek, and whether to negotiate or accept plea bargains. The Commonwealth is under no duty to accept an offer of a plea in exchange for a sentence less than death." *Id.* at 487.

Next, Appellant argues that determining whether death is an appropriate punishment "is an exercise in metaphysics beyond the abilities of Plato's philosopher kings." *Appellant's brief* at 33. Thus, Appellant argues that the sentencer in a capital case must be given the type of comparative information required by KRS 532.075(5)(b) for the sentencer's consideration. As made clear by this Court, whether the jury or the trial judge should consider comparative case law is a policy determination for the General Assembly, not this Court:

> It is a function of the General Assembly to say when and if the death penalty shall be imposed, and this includes the right to prescribe the special type of review of punishment and errors enumerated by way of appeal prescribed in KRS 532.075, limited only by the Kentucky Constitution, the United States Constitution, and the decisions of the United States Supreme Court.

Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky. 1989).

Because there is no constitutional requirement for holding a proportionality review, *Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879 (1984), the Court must yield to the legislative will as to the requirements of KRS 532.075.

Next, Appellant makes a second attack in this section on the trial judge's decision not to hold a second competency hearing. The Commonwealth stands by and incorporates its arguments on this issue *supra*. Additionally, the Commonwealth notes that KRS 431.2135 provides a procedure for assuring Appellant's competency before execution.

Finally, Appellant, or more precisely, Appellant's counsel argue that Appellant has changed his mind about the death penalty. That he "no longer desires to be put to death." There's nothing in the record to support this assertion. Moreover, it's impossible to see how this assertion has any relevance to the issues on this appeal, which concern a review of the proceedings below. Avenues other than direct appeal exist for raising arguments concerning events that occur *after* entry of judgment and final sentence.

CONCLUSION

Appellant beat his wife and child to death with a dumbbell. Sometime after his arrest, he decided to do the right thing by taking responsibility for his actions and plead guilty. He also asked to be sentenced to death. Faced with a difficult and rare, if not unique, situation the seasoned trial judge carefully balanced the competing interests and obligations he faced.

First, the trial judge correctly and promptly determined that Appellant's suicide attempt created an issue as to Appellant's competence to plead guilty. The trial judge then held a competency hearing allowing the defense a full and fair opportunity to introduce evidence concerning Appellant's competence. After the hearing and considering all of the evidence, the trial judge correctly found that Appellant was competent to plead guilty. This finding is fully supported by the record.

On the other hand, nothing in the record supports Appellant's argument on appeal that his decision to plead guilty created a new question as to his competency so that a second competency hearing was required before the trial judge accepted Appellant's guilty plea. Indeed, Appellant's demeanor in the *Boykin* hearing confirms the correctness of the trial judge's ruling. Appellant was clearly in possession of his faculties and senses. He demonstrated a clear understanding of his rights and the rights he would be giving up by pleading guilty. The record also supports the trial judge's finding that Appellant's plea was knowing, intelligently, and voluntarily made.

As for Appellant's statutory and constitutional construction arguments, the Commonwealth is not required to prove beyond a reasonable doubt that death is an appropriate punishment. Next, neither statutes nor the Kentucky Constitution requires jury sentencing. The

statutory scheme for death-penalty proceedings expressly provides for judge sentencing. almost thirty years ago in *Short v. Commonwealth*, *supra.* this Court's predecessor Court examined the Kentucky Constitution and concluded that it provided no impediment to waiving jury sentencing in felony trials. This Court recently reaffirmed *Short* in *Jackson v. Commonwealth*, *supra.*. Appellant simply fails to put forth a compelling case for reversing *Short's* long-standing precedent.

As for Appellant's KRS 532.075's arguments, the trial court was required by the statute to prepare a report to be included in the record of this case. Because there is no constitutional requirement that the sentencer in a death-penalty case be given comparative case law, this Court may not subvert the legislative will by creating such a requirement. Finally, based on this record, there is no basis for setting aside Appellant's sentence under KRS 532.075.

Respectfully submitted,

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