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SUPREME COURT OF KENTUCKY
NO. 2005-SC-70-MR

MARCO ALLEN CHAPMAN **APPELLANT**

Appeal From Boone Circuit Court
No. 2003-CR-291
versus **Venue Changed From Gallatin Circuit Court**
Indictment No. 2002-CR-35
Honorable Anthony Frohlich, Boone Circuit Judge

FILED
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SUPREME COURT

COMMONWEALTH OF KENTUCKY **APPELLEE**

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INTRODUCTION

Marco Chapman broke into a residence where he murdered two children, ages six and seven, by slashing their throats.

Chapman slashed the throat of a 10-year-old who he left for dead but she survived.

Chapman cut the clothing off the children's mother. He robbed her, bound her to a bed with duct tape and a vacuum cleaner cord, raped her, and stabbed her with several knives, some of which broke during the ordeal. Chapman left her for dead but she survived.

Chapman pleaded guilty, waived jury-recommended sentencing, requested the maximum punishment, and received the death penalty.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

In accordance with CR 76.12(4)(d)(iii), the Commonwealth states that it does not accept the statement of the case appearing in the brief for the appellant.

A.

FACTS OF THE CASE

On December 7, 2004, Marco Chapman agreed in writing to the following summary of facts:

> On Friday, August 23, 2002, at approximately 4:10 a.m., the Defendant Marco Allen Chapman, knocked on the door of the Marksberry residence located at 110 Weldon Way, Warsaw, Gallatin County, Kentucky. When Carolyn Marksberry opened the door, the Defendant asked to borrow her telephone. The defendant was a person known to her, as he had previously dated her best friend. The Defendant entered the residence with a duffel bag which contained duct tape and at least one knife. The Defendant put the knife to Mrs. Marksberry's throat and demanded all of her money. After removing her cash and credit cards from her purse, all the while holding a knife to her throat, he escorted her back to her bedroom and tied and bound her. He thereafter engaged in sexual intercourse by forcible compulsion, and while armed with a deadly weapon. He stabbed her repeatedly, causing multiple serious physical injuries, and only left the room after he believed that she was dead. He thereafter proceeded to stab Courtney Sharon (the oldest child

> of Carolyn Marksberry), who was 10 years old at the time, with a deadly weapon in the chest, neck and face area. Courtney Sharon "played dead", and he thereafter began stabbing Cody Sharon, who was 6 years old. He stabbed Cody repeatedly in the back, and slashed his throat, which injury resulted in his death. Finally, he stabbed Chelbi Sharon, 7 years old, repeatedly, as she struggled with him, resulted in many deep defensive wounds. He likewise slashed her throat, which injury resulted in her death. At the time of the commission of these offenses, the Defendant was a convicted felon, having previously served time in the federal system for Bank Robbery.

(TR Vol. IV, pp. 505-506) (parentheses original).

Kentucky State Police Detective Todd Harwood testified concerning all of the above facts. (Videotape XII, 12/14/04, 03:00:56-03:08:56). He added that:

(1) Chapman had confessed to the murders to the West Virginia State Police;

(2) Chapman had bound Carolyn Marksberry to the frame of her bed with duct tape and a vacuum cleaner cord before raping her;

(3) Chapman had used a knife to cut Carolyn Marksberry's clothes off of her;

(4) on at least two occasions during this ordeal, Chapman had found it necessary to interrupt his stabbing of Carolyn Marksberry, so that he could go the kitchen to replenish his supply of knives and return to the bedroom with them, because during the stabbing he kept breaking the knives;

(5) ten-year-old Courtney Sharon had been required to remain perfectly still on the floor, bleeding and playing dead, while she watched Chapman stabbing her baby brother Cody Sharon to death; and

(6) at the time he committed these crimes, Chapman was on parole and residing in West Virginia after having served four years in a federal penitentiary for robbing a bank in Texas.

(*Id.*).

The statutory aggravating circumstances for each of the two murders were:

(i) murder committed during the course of a First-Degree Burglary;

(ii) murder committed during the course of a First-Degree Robbery;

(iii) murder committed during the course of a First-Degree Rape; and

(iv) the murderer's conduct resulted in multiple, intentional deaths. (TR Vol. I, pp. 5-7; Videotape XII, 12/14/04, 03:08:15-03:08:56; TR Vol. IV, pp. 518-522).

B.

PROCEDURAL HISTORY

Chapman committed these crimes on August 23, 2002. (TR Vol. IV, p. 505).

An interstate manhunt ensued. (TR Vol. III, pp. 280-281). The Kentucky State Police issued NCIC teletypes nationally, seeking Chapman's arrest for the murders of Chelbi Sharon and Cody Sharon. (*Id.*). The Kentucky State Police also alerted West Virginia law enforcement authorities to information they had received from Chapman's former employer, that he had fled to a particular residence in Cabin Creek, West Virginia. (*Id.*). Chapman reportedly was driving a Dodge pickup truck. (*Id.*).

On the same day he committed the crimes in this case, August 23, 2002, Chapman was arrested by Kanawha County, West Virginia sheriff's deputies in Shrewsbury, West Virginia. (*Id.*, pp. 280-283, 292). Chapman had just left the residence in nearby Cabin Creek, West Virginia. (*Id.*, pp. 280-281). The sheriff's deputies spotted Chapman while he was driving the Dodge pickup

truck in Shrewsbury. (*Id.*).

Chapman executed a waiver of extradition to Kentucky on August 27, 2002. (TR Vol. I, p. 13).

The Kentucky State Police received and arrested Chapman on August 29, 2002. (*Id.*, pp. 9-10).

On September 25, 2002, a Gallatin County grand jury returned a nine-count indictment against Chapman. (*Id.*, pp. 1-4). In all, the grand jury charged Chapman with two counts of Capital Murder, two counts of Criminal Attempt to Commit Murder, First-Degree Rape, First-Degree Burglary, First-Degree Robbery, and being a Second-Degree Persistent Felony Offender (PFO II) by reason of a prior felony conviction, namely, his federal bank robbery conviction in Texas. (*Id.*).

On the same day, September 25, 2002, the Commonwealth's Attorney filed and served on defense counsel written notice of her intent to seek the death penalty for the murders of Chelbi Sharon and Cody Sharon, based on the four statutory aggravating circumstances described at the bottom of the third page of this brief. (*Id.*, pp. 5-7).

Venue for the trial of this case was removed from Gallatin County to adjoining Boone County, by order entered July 17, 2003. (TR Vol. II, pp. 223-

226).

C.

CHAPMAN'S COMPETENCY

On February 27, 2004, Chapman's defense lawyers, Hon. John Delaney and Hon. James C. Gibson, Jr., Assistant Public Advocates, filed a three-sentence notice of intent to introduce at trial evidence of "mental retardation and / or mental disease or defect." (TR Vol. III, pp. 272-273).

(Until this appeal, the reports by mental health defense experts Dr. Peter Schilling and Dr. Ed Connor were unavailable to the Commonwealth and to the Circuit Judge, because defense counsel withheld them until 1:20 p.m. on the day of sentencing – less than two hours before Chapman's sentence of death was imposed. Videotape IX, 10/01/04, 10:35:00; Videotape X, 10/21/04, 03:51:05-03:51:48; Videotape XII, 12/14/04, 03:31:02-03:32:29. Schilling's and Connor's reports did not see the light of day until they were dumped into the record at the last minute, under seal, for the sole purpose of this appeal. Videotape XII, 12/14/04, 03:31:02-03:32:29.)

On March 24, 2004, the Commonwealth requested an independent mental health evaluation of Chapman at the Kentucky Correctional Psychiatric Center (KCPC). (*Id.*, pp. 274-275).

The May 12, 2004 order granting the Commonwealth's motion specified that the evaluation at KCPC would inquire into not only Chapman's intelligence, criminal responsibility and mental health, but also his competency to stand trial. (*Id.*, pp. 296-299). (The order appearing at TR Vol. III, pp. 296-299 bears a May 12, 2004 signature date and a May 12, 2004 entry date. Another order, identically worded but indented differently in several places, appears at TR Vol. III, pp. 300-303 and bears a May 11, 2004 signature date and a May 13, 2004 entry date.)

As it turned out, Chapman was evaluated by KCPC on three separate occasions, and three separate competency hearings were conducted. (Videotape IX, 10/01/04, 09:33:30-11:09:00; Videotape X, 10/21/04, 02:58:59-04:25:44; Videotape XI, 12/07/04, 02:30:10-03:28:24). Psychologist Dr. Stephen Free, of KCPC, testified as the lone witness in each of these three competency hearings. (*Id.*).

Judge Frohlich found Chapman competent on all three occasions. (Videotape IX, 10/01/04, 11:09:09-11:10:05; Videotape X, 10/21/04, 04:24:41-04:25:44; Videotape XI, 12/07/04, 03:40:56- 03:43:13).

D.

SELF-REPRESENTATION, GUILTY PLEA, AND DEATH SENTENCE

On October 13, 2004, Chapman filed a handwritten letter asking Judge Frohlich for leave to discharge his attorneys, represent himself, plead guilty, and be sentenced to death. (Videotape X, 10/21/04, 04:26:44).

That letter prompted the ordering of KCPC to examine Chapman for competency the second of the three times described above in section C of this counterstatement. (*Id.*, 03:00:28-03:02:49, 04:26:44).

Pursuant to that order, Dr. Free evaluated Chapman again on October 20, 2004. (*Id.*, 03:02:10-03:02:27). Dr. Free administered two additional competency testing instruments and interviewed Chapman for another one hour and forty minutes. (*Id.*, 03:02:10-03:02:49). As directed by the court, Dr. Free submitted a supplemental written report. (*Id.*, 03:02:49-03:03:05).

At the hearing on the following day, October 21, 2004, the court read Chapman's October 13, 2004 letter into the record. (*Id.*, 04:26:44-04:54:56).

Dr. Free testified again that Chapman was competent. (*Id.*, 03:03:05-03:12:52, 03:34:40-03:35:48). In response to follow up questioning by the court, Dr. Free expressed his view that the standard for competence to stand

trial is the same standard for competence to discharge defense counsel, represent one's self, plead guilty, and request imposition of a sentence of death. (*Id.*, 03:34:40-03:35:58).

Judge Frohlich again agreed with Dr. Free's opinion, that Chapman remained competent, but he disagreed with Dr. Free that the standard for competency to stand trial is the same as that for competency to discharge defense counsel, represent one's self, plead guilty, and request imposition of a sentence of death:

> I don't believe that the standard's quite the same. I think the law requires the court to inquire quite extensively into that situation with Mr. Chapman before such a decision can be made. (*Id.*, 04:25:24-04:25:36).

The court then engaged Chapman in a lengthy colloquy concerning his desire to discharge defense counsel and represent himself. (*Id.*, 04:26:44-04:54:56, 04:59:30-05:00:30).

That hearing carried over into a second day. (*Id.*, 05:01:01, 10/22/04, 09:04:20-09:05:34). On October 22, 2004, at the conclusion of the hearing, Judge Frohlich again expressed his view that the standard for what Chapman was wanting to do is more exacting than that for ordinary competency to stand trial. (*Id.*, 09:05:34-09:12:07). Exercising an abundance of caution, judge

Frohlich delayed his ruling on Chapman's request until such time as Chapman underwent a third evaluation at KCPC. (*Id.*). Judge Frohlich specified that Chapman was to undergo observation for a minimum of 30 days or what other period of time KCPC considered necessary, that KCPC was to administer to Chapman whatever treatment for depression it deemed appropriate, and that Chapman was to undergo a neuropsychological examination as newly requested by defense counsel. (*Id.*).

After Chapman was evaluated for the third time at KCPC, the court conducted the third competency hearing. (Videotape XI, 12/07/04, 02:03:10-03:28:24). Judge Frohlich for the third time found Chapman competent. (*Id.*, 03:40:56-03:43:13).

At that December 7, 2004 hearing, the court granted Chapman's request for leave to discharge his attorneys and represent himself. (*Id.*, 04:01:06-04:02:33). Judge Frohlich reappointed Messrs. Delaney and Gibson as standby counsel to advise Chapman if he requested it. (*Id.*).

Immediately thereafter, Judge Frohlich engaged Chapman in an on-the-record guilty plea colloquy which lasted 37 minutes and 55 seconds. (*Id.*, 04:28:54-05:06:49).

Detective Harwood testified concerning the factual basis for the plea and the aggravating circumstances prior to Chapman's sentencing. (Videotape XII, 12/14/04, 03:00:56-03:08:56).

In accordance with his wishes, Chapman was sentenced to death on December 14, 2004. (*Id.*, 03:23:54-03:37:07).

Pursuant to KRS 532.075, this automatic appeal follows.

ARGUMENT

I.

THE COURT BELOW CORRECTLY DETERMINED THAT CHAPMAN WAS COMPETENT TO STAND TRIAL, TO DISCHARGE HIS DEFENSE LAWYERS, TO REPRESENT HIMSELF, TO PLEAD GUILTY, AND TO REQUEST THE DEATH PENALTY.

The premise of the brief for appellant is that anybody must be crazy to plead guilty and request the death penalty. The strategy of the brief for appellant is simply to refuse to accept the trial court's rulings concerning competency.

There also seems to be some implicit assumption that persons charged with crimes are incompetent until proven otherwise. The law, of course, makes the opposite presupposition, that people are competent until they are proven

to be incompetent. Jacobs v. Commonwealth, 58 S.W.3d 435 (Ky. 2001). The Commonwealth has no burden of proof in this regard.

As detailed in the preceding counterstatement of the case, the trial judge ordered **three** competency evaluations at KCPC. He conducted **three** separate hearings on Chapman's competency. Ordering three evaluations and conducting three competency hearings was the product of conscientiousness and thoroughness on the part of the learned trial judge. There was never any instance of a mental health expert opining that Chapman was incompetent, or that the expert just could not tell. On all three occasions, the sole mental health expert who testified said that Chapman was competent.

Quoted in the preceding counterstatement of the case, Judge Frohlich repeatedly explained that he was applying a higher standard for competency than that for purposes of merely standing trial. (In light of Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) and Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), the Attorney General disagrees that a higher standard is necessary. Godinez held that the standard of competency for pleading guilty and for waiving counsel is the same standard of competency for standing trial. Peyton held that the standard for determining competence to stand trial also applies in cases where a death-sentenced prisoner

seeks to forego further appeals.)

This judge in Chapman's case not only listened to the live testimony but also reviewed the videotapes of it. He reviewed legal research he already had done at the outset of inheriting this case.

Judge Frohlich's colloquy with Chapman concerning his decision to discharge his defense lawyers and represent himself fully satisfied the standard in Wilson v. Commonwealth, 836 S.W,2d 872 (Ky. 1992), which the Commonwealth's Attorney cited to the court.

Contrary to the argument contained in the brief for appellant, it is not unprecedented for a defendant to do what Chapman did here. See, *e.g.*, Harper v. Parker, 177 F.3d 567 (6th Cir. 1999) (a Kentucky case where the prisoner was permitted to withhold opposition to the death penalty and waive federal habeas corpus review after a "preliminary", less than full blown competency hearing in federal court); West v. Bell, 242 F.3d 338 (6th Cir. 2001) (same result in a Tennessee death penalty case).

Certainly by the time of the second and third KCPC competency evaluations it was known that Chapman wished to discharge his counsel, represent himself, plead guilty, and request the death penalty. Dr. Free's testimony at the second and third competency hearings made it clear that he took those wishes into

account in reassessing Chapman's competency.

There was no error in the handling of this matter. The judgment of the Boone Circuit Court should be affirmed.

II.

CHAPMAN'S GUILTY PLEA WAS MADE KNOWNGLY, INTELLIGENTLY AND VOLUNTARILY.

The multi-faceted argument in the brief for appellant leads off with a half hearted attack on the guilty plea colloquy between Chapman and Judge Frohlich. The argument suggests that Chapman merely answered "yes" to everything asked of him. The argument laments that Chapman claimed not to remember everything that happened during the crime spree. Finally, the argument intimates that Judge Frohlich all but skipped over the topic of mitigating circumstances.

Conspicuously absent from the argument is any allegation that a particular constitutional right, or statutory right for that matter, was left unexplored during these proceedings. The requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) were more than satisfied in this case. The nearly 38-minutes-long colloquy conducted here could fairly be described as a clinic on how to make absolutely certain that a guilty plea is

knowing, intelligent, and voluntary. (Videotape XII, 12/12/04, 04;28:54-05:06:49). The suggestion that Chapman never said anything but "yes" in response to the court's questions is refuted by the record. (*Id.*). The lamentation that Chapman could not remember every detail of the crimes is misplaced: it is not the purpose of a guilty plea colloquy to remedy the defendant's faulty memory of the crimes. As for mitigation, both Chapman and Judge Frohlich knew very well the content of all the available mitigation, in detail, from having heard Dr. Free's testimony about family history, child abuse, drug and alcohol abuse, head injuries, and a whole variety of mental health issues.

Lastly, the brief for appellant contends there was no factual basis for Chapman's guilty plea.

A factual basis for a guilty plea is not constitutionally required. Nevertheless, as detailed in the preceding counterstatement of the case, there was an exhaustive account of the crimes in this matter.

III.

THE PROCESS BY WHICH CHAPMAN WAS SENTENCED TO DEATH EXUDES RELIABILITY IN KENTUCKY'S CRIMINAL JUSTICE SYSTEM.

The brief for appellant contends that Chapman's sentence is unreliable because he was permitted to make his own choices and exercise rights

belonging exclusively to him.

To argue that a competent citizen of the United States cannot be entrusted to make decisions for himself is many things, not the least of them being arrogance on the part of those who consider themselves so much wiser that they would promote such an idea.

IV.

THE TRIAL JUDGE CONSIDERED ALL OF THE MITIGATION PROPERLY PRESENTED TO HIM.

As discussed previously in Argument II of this brief, Judge Frohlich knew very well what all of the mitigation would entail. Dr. Free, who testified on three separate occasions, described in detail Chapman's family history of problems, his childhood upbringing, alcoholism, abuse of a litany of drugs, child abuse, sexual preoccupation, suicidal thoughts, and mental health issues of all kinds.

At the time of Chapman's sentencing, Judge Frohlich stated for the record that he had not considered the mitigation described in a sealed pleading filed by defense counsel less than two hours prior to sentencing. (Videotape XII, 12/14/04, 03:31:02-03:32:29).Judge Frohlich stated that he did, however, consider whatever defense counsel had said in that same last-minute pleading about

Chapman's competency. (*Id.*). Judge Frohlich explained that in considering one but not the other in the same document, he was honoring Chapman's personal, constitutional right and decision not to allow consideration of evidence in mitigation of punishment. (*Id.*).

V.

THE WISH LIST URGED IN THE BRIEF FOR APPELLANT IS NOT REQUIRED BY LAW.

Disclaimers and assurances notwithstanding, the brief for appellant requests the creation of future measures ensuring that a criminal defendant can never again waive counsel, jury-recommended sentencing, or the presentation of mitigation. This list even goes on to include hopes for someday doing away with mandatory service as standby counsel, or at least relegating them to the safer and more strategic haven of *amici curiae.*

The foregoing wish list would be more appropriately presented to a criminal rules committee, and here it should be rejected out of hand.

VI.

A DEFENDANT'S REQUEST FOR AND ACQUIESCENCE IN A DEATH SENTENCE IS NOT "STATE ASSISTED SUICIDE."

As this Court will recall from the recent Eddie Lee Harper case

(conspicuously never mentioned in the brief for appellant) cited previously in Argument I of this brief, it is not unheard of that a capital murderer would prefer the death penalty over an entire lifetime in prison. Defense lawyers want to keep jurors who embrace the growing belief that life imprisonment is a more onerous sentence than the death penalty.

The fact of the matter is that preferring death over life imprisonment is not "state assisted suicide" just because death penalty abolitionists like to call it that. The federal courts discussed previously in Argument I of this brief obviously did not refer to it as "state assisted suicide."

VII.

IT WAS NOT ERROR TO RE-APPOINT MESSRS. DELANEY AND GIBSON AS STANDBY COUNSEL.

Endorsed in Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992), the appointment of standby counsel is one of those safeguards which should gladden the heart of any public defender agency.

Instead, the brief for appellant condemns the appointment of standby counsel in this case, even though Chapman never asked them for any advice or assistance once the guilty plea got underway. There was not any error in this matter.

VIII.

THERE IS NOTHING INAPPROPRIATE IN A PROSECUTOR'S OPEN-COURT ADVICE TO THE JUDGE ABOUT THE PROPER SCOPE OF A GUILTY PLEA COLLOQUY.

Page 70 of the brief for appellant accuses the prosecutor of "negotiating a plea deal" with Chapman behind the backs of defense counsel. That accusation is totally unsupported by the record. The brief for appellant just assumes there was improper contact with Chapman, because the prosecutor advised the judge in open court about the proper scope of the colloquy for the guilty plea which Chapman already had announced he wanted to enter.

Defense counsel certainly were not going to advise the judge about the scope of the guilty plea colloquy with Chapman. By advising the judge in the manner that she did, the prosecutor was dutifully protecting not only the interests of the public and of the legal system but also the rights of Chapman himself.

As long as they are tolerated, briefs of counsel idly accusing prosecutors of unprofessional conduct will continue to be commonplace.

IX.

THERE IS NO REQUIREMENT THAT THE AGGRAVATING CIRCUMSTANCES FOR THE DEATH PENALTY BE INCLUDED IN THE INDICTMENT FOR MURDER.

The brief for appellant argues that an indictment for capital murder must also list the aggravating circumstances. This is a boilerplate argument made and rejected in every death penalty appeal which comes before this Court on direct appeal.

It is enough that the aggravating circumstances are listed in the written notice of the government's intent to seek the death penalty. Garland v. Commonwealth, 127 S.W.3d 529 (Ky. 2003); Ernst v. Commonwealth, 160 S.W.3d 744 (Ky. 2005).

X.

CHAPMAN'S SENTENCES OF DEATH ARE NEITHER ARBITRARY NOR DISPROPORTIONATE.

The brief for appellant gnashes that Chapman's sentences of death are arbitrary and disproportionate. The argument presented there considers the crimes irrelevant, because it makes no mention of them whatsoever. It instead focuses exclusively on an offer of proof (mitigation) which Chapman, having been found competent to do, declined as was his prerogative and his Sixth Amendment

right to do.

Page 83 of the brief for appellant states that "our legal system functions more akin to the whims of a monarchy than to the logically deliberate actions of a just society." That assertion is uncalled for, offensive, and disrespectful.

Chapman horrifically murdered two innocent, young children. This was during the course of a burglary, a robbery, the attempted murder of a third child, and the rape and attempted murder of those children's mother. Chapman's sentences of death are anything but arbitrary or disproportionate. Compare: Marlowe v. Commonwealth, 709 S.W.2d 424 (Ky. 1986); Baze v. Commonwealth, 965 S.W.2d 817 (Ky. 1997).

XI.

PROPORTIONALITY REVIEW IS NOT A CONSTITUTIONAL REQUIREMENT.

Proportionality review is not a constitutional requirement. McCleskey v. Kemp, 481U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996).

Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001), cited in the brief for appellant, is an aberration. Greer v. Mitchell contains no analysis of the issue

whatsoever. It cites no authority for the passing remark of that panel imputing federal due process rights to proportionality review undertaken by state appellate courts.

Also cited in the brief for appellant is Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). A Kentucky case, Evitts v. Lucey extended the Sixth Amendment's right to counsel at trial to include a limited right to counsel on direct appeal. The Sixth Amendment refers only to a right to counsel at trial. It makes no mention of direct appeal, which was all but unheard of at the time the Sixth Amendment was adopted. The legal fiction indulged in Evitts v. Lucey was that long since the Sixth Amendment's adoption, direct appeals have become so commonplace that they might as well be view as an extension of the trial itself. The right to counsel effectiveness created in Evitts v. Lucey is only that which ensures a direct appeal at all. It does not envision the kind of issue-by-issue scrutiny experienced in claims of trial counsel ineffectiveness. During the 21 years since Evitts v. Lucey was decided, the defense bar's attempts to extend it beyond direct appeal have failed. More importantly here, Evitts v. Lucey has nothing to do with proportionality review.

Chapman's death sentences for the intentional murder of two young, innocent children during the course of a burglary, robbery, and rape of

their mother is not disproportionate by any stretch of the imagination. Compare: Marlowe v. Commonwealth, 709 S.W.2d 424 (Ky. 1986); Baze v. Commonwealth, 965 S.W.2d 817 (Ky. 1997).

XII.

KENTUCKY'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The brief for appellant argues that Kentucky's death penalty statute is unconstitutional. This boilerplate, cover-all argument is made in every death penalty case which comes before this Court on direct appeal. This Court has rejected it in every instance. See, *e.g.*, Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997). The brief for appellant offers no new reason why the Court should rule differently in this case.

XIII.

EXECUTION, WHETHER BY LETHAL INJECTION OR ELECTROCUTION, IS NOT CRUEL AND UNUSUAL PUNISHMENT.

The brief for appellant argues that the execution of a death sentence by lethal injection or electrocution is *per se* contrary to the Eighth Amendment's guarantee against cruel and unusual punishment. This boilerplate argument is presented in every death penalty case which comes before this Court

on direct appeal. It is rejected in every instance. *E.g.*, McQueen v. Parker, 950 S.W.2d 226 (Ky. 1997); Furnish v. Commonwealth, __ S.W.3d __ (Ky., September 21, 2006) (NOT FINAL: petition for rehearing pending).

The brief for appellant cites no authority holding that the execution of a death sentence by means of lethal injection or electrocution is prohibited by the Eighth Amendment to the United States Constitution as cruel and unusual punishment.

XIV.

CHAPMAN'S DEATH SENTENCES ARE NOT BARRED BY "RESIDUAL DOUBT."

The brief for appellant urges this Court to entertain "residual doubt" about the appropriateness of the guilty plea and death sentence in this case. The brief for appellant cites Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

The argument in this instance is unsupported and misguided. It is unsupported because the majority in Lockhart v. McCree rejected the notion of "residual doubt" discussed in Justice Thurgood Marshall's dissent. This Court flatly rejected the idea of "residual doubt" as a mitigating circumstance in Epperson v. Commonwealth, 197 S.W.3d 46 (Ky. 2003). Most recently, the

United States Supreme Court reaffirmed its rejection of the concept of "residual doubt" as a mitigating factor in Oregon v. Guzek, __ U.S. __, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006).

The brief for appellant is misguided because even the death penalty abolitionists who subscribe to the "residual doubt" theory believe is a sentencing phenomenon occasioned by lingering doubt about the culprit's identity. Therefore, even according to the theory's own proponents, "residual doubt" would not have anything to do with the voluntariness or validity of a guilty plea. Moreover, there is no doubt whatsoever about Chapman's acts, his guilt, or his identity as the culprit in this case.

XV.

THERE WAS NO CUMULATIVE ERROR IN THESE PROCEEDINGS.

As shown by the record of this case and by all of the foregoing points, authorities and arguments, there was no error in these proceedings. Consequently, there is no occasion for this Court to conclude that cumulative error took place in this case.

The Circuit Judge, the Commonwealth's Attorney, and both of Chapman's defense attorneys all exercised exhaustive thoroughness, long

patience, and extreme caution in their handling of this entire matter from beginning to end. The approach to this situation taken by all of the principals involved here would well serve as a model for others who encounter similar circumstances in the future. Justice was not only served. It was served in a manner both exemplary to bench and bar, and in a manner inspirational of public confidence in Kentucky's criminal justice system. This Court may confidently conclude that a fair and reliable result obtained.

CONCLUSION

WHEREFORE, the judgment below should be affirmed.

Respectfully Submitted,

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