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

MARCO ALLEN CHAPMAN — APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HON. ANTHONY FROHLICH, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed, postage prepaid, to Hon.Anthony Frohlich, Judge, Boone Circuit Court, Justice Center, 444 Justice Center, 6025 Rogers Lane, Burlington, KY 41005; Hon. Linda Tally Smith, Commonwealth Attorney, PO Box 168, Burlington, KY 41005; Hon., John Delaney, Trial Counsel, 8311 US 42, Victory Center, Suite 210, Florence, KY 41042; Hon. Jim C. Gibson, Trial Counsel, PO Box 6570, Shepherdsville, KY 40165; Hon. Greg Stumbo, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601, on February 28, 2006. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

Donna L. Boyce

INTRODUCTION

This case presents the unusual situation wherein capital defendant Marc Chapman sought the death penalty for his crimes. Mr. Chapman and the prosecution negotiated a plea bargain under which he would receive a sentence of death in exchange for the prosecution's agreement to waive a jury. Despite substantial questions about Mr. Chapman's competency and his acknowledgment that he was seeking "suicide by court", he was permitted to pled guilty, waive counsel, waive jury sentencing, and waive presentation of mitigating evidence. He requested and received a sentence of death. The issues presented by this case involve the friction between an individual's right to control his destiny and the state's interest in ensuring the integrity and reliability of the process and verdict as well as society's duty to see that executions do not become a vehicle by which a person could commit suicide.

STATEMENT CONCERNING ORAL ARGUMENT

Marc Chapman requests oral argument based on the severity of the sanctions imposed and the complexity of the factual and legal issues involved. Additionally, this case presents several issues of first impression for this Court. Oral argument will assist this Court in reaching a just decision.

PREFACE

Unpreserved errors are reviewable where the death penalty has been imposed. KRS 532.075(2); Rogers v. Commonwealth, 992 S.W.2d 183, 187 (Ky. 1999); Perdue v. Commonwealth, 916 S.W.2d 148, 153-154 (Ky. 1995). The rationale for this rule is that a death sentence death is unlike all other sanctions. Rogers, supra (citing Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989), citing Beck v. Alabama, 447 U.S. 625

(1980)). Accordingly, the invocation of the death penalty requires greater caution and reliability than is normally necessary in the criminal justice process. Id. Every allegation of error in this case should be reviewed in this context. KRE 103(e) allows this Court to consider "insufficiently raised or preserved" errors and to grant appropriate relief "upon a determination that manifest injustice has resulted from the error." Any unpreserved errors, along with all preserved errors, were prejudicial, i.e., without the errors Mr. Chapman may not have been sentenced to death. Perdue, supra. In accordance with CR 76.12(4)(c)(iv), counsel have noted at the beginning of each issue whether it is preserved. To avoid repetition, counsel will not refer to the capital case contemporaneous objection rule, KRE 103(e) and RCr 10.26 where the issue is unpreserved.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Marc Chapman has endured a "very chaotic" life beginning from the time he was an infant. Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation and Report of Ed Connor (Sealed Exhibit, hereinafter referred to as such). Even as a baby he was depressed because of the emotional detachment of his mother and father. Id. His parents suffered from depression, serious alcohol abuse and mental disorders. Tape 9, 10/1/04, 9:49:33 -50, 10:01:55 – 10:31:43. They were violent with each other and with Chapman. Sealed Exhibit. He was sexually abused by his father. Id. His father sexually abused him and routinely beat him unconscious. Tape 9, 10/1/04, 9:49:33 -50, 10:01:55 – 10:31:43. His mother hit him on the head with a cast iron skillet. Id. They gave him alcohol in his baby bottle. Id. A babysitter molested him. Sealed Exhibit.

He began to smoke marijuana and drink alcohol when he was only eight years old. Sealed Exhibit. He became sexually active and suicidal even though he was still a child. Id. But his problems were only exacerbated as he grew older. When he was a teen, a gang of boys attempted to assault him sexually in a juvenile prison. Id. His drug and alcohol abuse got worse. Id.

All of this caused Chapman to experience dissociative states. Sealed exhibit. His dissociative episodes increased in frequency over time. Id. He suffered from depression, substance abuse, and from being sexually abused for years. Tape 9, 10/1/04, 9:49:33-50, 10:01:55–10:31:43. His dysfunctional life predisposed him to the substance abuse and to mental illness. Id. Conduct disorders and dysthymia plagued him. His emotional disturbance had physical manifestations. Id. He had flashbacks, a racing mind and an

inability to focus. Id. Racing thoughts, dramatic mood swings and depression are all symptoms of Bi-polar Disorder. Id. Suffering from a major depression and post-traumatic stress, he attempted suicide at the age of 14 by hanging himself and cutting his wrists. Id. By this time he had added LSD, embalming fluid and PCP to the other substances he abused. Id. He had recurrent thoughts of suicide. Id. He also had gender identity issues. Id.

Chapman could not control his actions and continued to have gender identity confusion even after he became an adult. Id. He abused heroin, cocaine, crack, and methamphetamine, and drank alcohol in binges. Id. He was in acute psychological turmoil suffering from substance dependence, Dysthymic Disorder, Post-traumatic Stress Disorder, intrusive thoughts, odd sensory experiences, including visual and auditory hallucinations, dramatic mood swings, troubling thoughts and dreams, and personality disorders (he had symptoms of both Borderline and Anti-social Disorder). Tape 9; 10/1/04; 9:48:18–9:49:33; 10:52:50–10:54:09, Sealed Exhibit A - Tape; 10/13/04; 10:58:15, Tape 10, 10/21/04, 3:20:40-3:26:15. He had symptoms of depression. Id. His insight and judgment were impaired. Id.

Chapman had a preoccupation with suicide and almost daily thoughts of killing himself. Id. He felt hopeless and worthless. Id. Persons with similar psychological profiles exhibit psychotic symptoms and an impaired contact with reality. Id.

On August 23, 2002, Chapman entered the home where Carolyn Marksberry, resided with her children, Cody, 6 years old, Chelbi, age 7, and Courtney, age 10. Tape 12; 12/14/04; 3:02:25. Cody was stabbed in the back and his neck was slashed. Chelbi's throat was also slashed. Both children died. Chapman attempted to kill Courtney by

repeatedly stabbing her, but she survived by falling to the ground and pretending to be dead. As she was lying on the floor she saw Chapman kill Cody. Their mother was raped. She was also stabbed repeatedly with multiple knives that Chapman retrieved from the kitchen after some of them broke. She remained alive by pretending to be dead. When Carolyn was found she was bound with duct tape and had been tied to a bed frame with a vacuum cleaner cord. Her clothing had been cut off. Id.

At the time the crimes were committed Chapman may have been suffering a dissociative episode while he was very intoxicated on alcohol and drugs. He was still suicidal and under the influence of all of the mental illnesses that began in childhood. Sealed Exhibit.

Chapman's suicidal preoccupation continued and intensified after the commission of the crimes. He asked the officer who arrested him to shoot him in the head to be "down [sic] and over with it." Commonwealth Exhibit #1, page 3. He told the officer that if he had the opportunity at the time he was apprehended he would have killed himself by taking sleeping pills he had in his possession. Id., 5. He said the only thing that would help him would be a bullet or the electric chair. Id., 13. He tried to escape from a deputy sheriff before a pre-trial hearing so he would be shot. Tape 4; 1/14/03; 12:47:20, Tape 10, 10/21/04, 3:20:40-3:26:15. He pleaded with the deputy, "Shoot me, shoot me!" Tape 6; 3/24/04; 12:20:50. Dr. Steven Free, a psychiatrist at the Kentucky Correctional Psychiatric Center, said Chapman told him this was a suicide attempt. Tape 10; 10/21/04; 3:20:40-3:26:15. Chapman also told Dr. Free that he contemplated suicide depending on the course of the case. Id. He said he wanted to commit "suicide by court." Tape 10; 10/21/04; 15:33:10.

On October 13, 2004, Chapman told the court that he wanted to fire his attorneys, waive his trial, plead to all the crimes charged and be put to death. "Sealed Exhibit A," Tape, 10/13/04, 10:58:18. Even before Chapman did this, Dr. Free, who had evaluated him earlier for competency to stand trial, said Chapman should be treated for his depression. Tape 9; 10/1/04; 9:48:1—9:49:35. Dr. Free later said Chapman's plea for death could be caused by Chapman's depression and that he had "less certainty" about his conclusion of competency. A better determination could be made after Chapman was treated. Tape 10; 10/21/04; 3:04:20, 3:43:10. The depression would likely impact Chapman's decision-making process. Tape 11; 12/07/04; 2:52:00, 3:16:30, 3:22:00, 3:24:00. He thought Chapman might decide not to ask for death if he were treated. Tape 10; 10/21/04; 15:36:00-15:37:35. The court ordered the treatment at KCPC before a decision on competency would be made. Tape 10; 10/22/04; 9:05:00.

The only "treatment" Chapman ended up receiving was the drug Zoloft. But Chapman told Dr. Free at the time of his release from KCPC, just before he asked to be killed, that the Zoloft was not working. Tape 11; 12/07/04; 2:42:10, 3:12:00. He was still depressed. Despite ordering treatment, the court gave no consideration to the lack of it when it allowed Chapman to fire his attorneys and waive his right to a trial so he could plead to death. Tape 11; 12/07/04; 3:40:53.

The prosecutor prepared for Chapman a "motion to enter guilty plea." TR IV, 508-514; Tape 11, 12/7/04, 4:26:00. Although Chapman did not want counsel to represent him, and the attorneys did not want to participate in what they believed was a suicide, the trial court compelled them to remain as stand-by counsel. Id., 4:02:27.

On December 7, 2004, Chapman was allowed to plead guilty to all charges - two counts of murder, two of attempted murder, first degree rape, first degree robbery, first degree burglary, and for being a persistent felony offender in the second degree. Tape 11; 12/07/04; 4:28:30. After hearsay testimony from Kentucky State Police Detective Todd Harwood about the crimes and aggravating circumstances, and from Carolyn Marksberry about the impact of the crimes, Chapman was sentenced on December 14, 2004. The court declined to consider mitigating evidence tendered by stand-by counsel. Tape 12; 12/14/04; 3:28:25. It also told Chapman that he was free to choose death as his sentence. Tape 12; 12/14/04; 3:28:25. Chapman expressed remorse for his crimes although he said he didn't remember exactly what happened. Id. at 3:37:20. Chapman was sentenced to death for the two counts of murder, life imprisonment the rape and, in light of the PFO enhancement, life imprisonment for each of the attempted murder, robbery and burglary counts. Id. at 3:31:30. The Final Judgment was entered on December 17, 2004. TR 4, 518. The Notice of Appeal followed on January 13, 2005. TR 4, 538.

ARGUMENTS

1. MARC CHAPMAN'S WAIVERS, TO ENABLE HIM TO PLEA TO BE KILLED, WERE INVALID BECAUSE THE COURT EMPLOYED AN INCORRECT STANDARD OF COMPETENCE, FAILING TO TAKE INTO ACCOUNT THAT HE WAS MENTALLY ILL AND SUICIDAL, AND HAD NOT BEEN TREATED FOR THE DEPRESSION FOR WHICH HIS COMPETENCY WAS QUESTIONED, RENDERING HIS DESIRE TO DIE IRRATIONAL AND IMPAIRING HIS CAPACITY TO UNDERSTAND THE CHOICE BETWEEN LIFE AND DEATH.

This issue is preserved by counsel's argument that Marc Chapman's was not competent to waive his right to counsel and to a trial in order to plead that he be executed. Sealed Exhibit A, Tape, 10/13/04; 11:11:10, Tape 10; 10/21/04; 3:46:00, 5:00:30, Tape 11; 12/07/04; 3:32:26, 3:40:53.

A. Marc Chapman Has a History of Being Severely Abused, Sexually and Physically by His Parents; of Suicidal Ideation and Attempts to Kill Himself; and of Psychiatric Illnesses and Disorders, including Depression, From Which He Suffered at the Time He Was Allowed to Plead to be Killed and May Have Caused Him to Make this Decision.

Dr. Ed Connor, who prepared a psychological evaluation of Marc Chapman that was tendered by stand-by counsel as a mitigation exhibit, said Chapman endured a "very chaotic history." Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation and Report of Ed Connor (Sealed Exhibit). Chapman was depressed even as a baby because of the emotional detachment of his alcoholic mother and pedophile father. Id. There was violence and sexual abuse in his home. Id. He was sexually abused by his father. Id. He suffered dissociative states. Severe alcohol and drug abuse began when he was only eight years old. Id. He was molested by a caregiver. Id. He became sexually active and suicidal. Id.

Chapman, as a teenager, suffered an attempted sexual assault by a gang of boys in juvenile prison. Id. His drug and alcohol abuse grew worse. Id. So did his dissociative episodes. Id. The crimes charged may have occurred during one of these periods and while Chapman was very intoxicated on alcohol and drugs. Id. At the time of the crimes he was still suicidal and under the influence of a mental illness that began in childhood.Id.

At Chapman's initial competency hearing, Dr. Steven Free agreed Chapman had a long history of depression, substance abuse, pedophilia, and mental illnesses in his family. Tape 9, 10/1/04, 9:49:33 -50, 10:01:55 – 10:31:43. Chapman's father and mother suffered from depression, serious alcohol abuse and mental disorders. Id. Chapman had conduct disorders and dysthymia as a child and physical indications of an emotional disturbance Id. He had flashbacks, a racing mind and an inability to focus. Id. At 14, he was hospitalized due to another suicide attempt. Id. Major depression and post-traumatic stress were responsible. Id.

Sexual disorders and an obsession with gender identity plagued Marc. Id. Alcohol and drugs were used in excess. Id. His life history pre-disposed him to substance abuse and mental illness. Id. He was beaten unconscious by his father, hit on the head with a cast iron skillet by his mother and was thrown into walls and punched. Id. His parents gave him alcohol in his baby bottle. Id. He drank alcohol and smoked marijuana by eight or nine, and took LSD, embalming fluid and PCP by 14. Id. Chapman had racing thoughts, dramatic mood swings and depression—all symptomatic of bi-polar disorder. Id. He had recurrent thoughts of suicide. Id.

As an adult, Chapman had visual hallucinations. Id. He could not control his actions and was beset by gender identity confusion. Id. He abused heroin, cocaine, crack, and methamphetamine, and was a binge drinker. Id. He was in acute psychological turmoil. Id. He suffered from substance dependence, dysthymic disorder, post-traumatic stress disorder, intrusive thoughts, odd sensory experiences, and personality disorder (he had symptoms of both borderline and anti-social disorders). Id. at 9:48:18 – 9:49:33; 10:52:50 – 10:54:09. Dr Free testified Chapman needed and should receive treatment. Id.

At the second competency hearing, held after Chapman asked to fire his attorneys, waive his trial and plead "guilty to death," Dr. Free said Chapman had almost daily thoughts of suicide and tried to commit suicide on multiple occasions. Sealed Exhibit A - Tape; 10/13/04; 10:58:15, Tape 10, 10/21/04, 3:20:40-3:26:15. He had symptoms of depression as well as suicidal preoccupation. Id. His insight and judgment were impaired. Id. He heard voices, had dramatic mood swings, troubling thoughts, dreams and fantasies, feelings of hopelessness and worthlessness. Id. Persons with similar psychological profiles to Chapman are described as exhibiting psychotic symptoms and an impaired contact with reality. Id.

At 14, Chapman tried to hang himself and cut his wrists. Id. Chapman asked the officer who arrested him on the instant charges to shoot him in the head to be "down [sic] and over with it." Commonwealth Exhibit #1, page 3. He told the officer that if he had the opportunity at the time he was apprehended he would have taken sleeping pills he had in his possession in order to kill himself. Id., 5. A bullet or the electric chair, he told the officer, was the "only help I can get." Id., 13. He tried to escape from a deputy before

a pre-trial hearing so he would be shot. Tape 4; 1/14/03; 12:47:20, Tape 10, 10/21/04, 3:20:40-3:26:15. He pleaded, "Shoot me, shoot me!" Tape 6; 3/24/04; 12:20:50. Dr. Free said Chapman told him this was a suicide attempt. Tape 10, 10/21/04, 3:20:40 - 3:26:15. He also told Dr. Free that he contemplated suicide depending on how the case turned out. Id. Chapman told Dr. Free that he hoped to commit "suicide by court." Tape 10; 10/21/04; 15:33:10.

Even before Chapman expressed his desire to plead to die, Dr. Free said he believed that Chapman should be treated for his depression. Tape 9; 10/1/04; 9:48:1—9:49:35. Free later said Chapman's plea for death could be caused by Chapman's depression; that he had "less certainty" about his conclusion Chapman was competent to stand trial; and a determination of competency could better be made after Chapman was treated. Tape 10; 10/21/04; 3:04:20, 3:43:10. He said he thought Chapman might decide not to plead to die if he were treated. Tape 10; 10/21/04; 3:36:00-3:37:35. The court ordered that treatment be afforded at the Kentucky Correctional Psychiatric Center before it would make a determination of whether Chapman was competent to fire his attorneys, waive his trial and plead to die. Tape 10; 10/22/04; 9:05:00.

At a subsequent hearing it became clear Chapman received no treatment that had any affect on his depression. Dr. Free said the only "treatment" Chapman received was the drug Zoloft for 30 days, but the drug would not relieve the depression within that time. The depression would likely impact Chapman's decision-making process. Tape 11; 12/07/04; 2:52:00, 3:16:30, 3:22:00, 3:24:00. Free said it generally takes two to four

weeks for Zoloft to be effective. Tape 11; 12/07/04; 2:34:50.[1] But Chapman, although he wanted the court to find him competent so he could get his wish to die, told Dr. Free at the time of his release from KCPC – just before he pled for death – that the Zoloft was not working. Tape 11; 12/07/04; 2:42:10, 3:12:00. He was still depressed. Dr. Free said he could not say Chapman received any other treatment. Tape 11; 12/07/04; 2:54:40-2:57:30. The prosecutor presented no evidence to show that any was afforded. Chapman was still depressed either because the Zoloft was not yet working or some other drug was needed. Tape 11; 12/07/04; 2:34:50.

It is curious that the court, despite ordering treatment because of its serious concern about the effect of Chapman's mental illnesses on his decision to kill himself, gave no consideration to the lack of treatment ultimately when Chapman was ruled competent to fire his attorneys and waive his right to a trial. Tape 11; 12/07/04; 3:40:53. This was critical to a determination of whether Chapman's mental diseases, disorders and defects may have affected his decision plead to be killed.

B. Competency to Plead to be Killed and to Plead Guilty is Vastly Different.

A guilty plea is "... perhaps the most devastating waiver possible under our constitution." Dukes v. Warden, 406 U.S. 250 (1974) (Stewart, J. concurring). A defendant must be competent to make this ultimate waiver. Gabbard v. Commonwealth Ky., 887 S.W.2d 547 (1994).[2] If the defendant is incompetent, a knowing, intelligent and voluntary waiver of his right to trial and any other right is impossible. Generally, competency to stand trial and competency to enter a guilty plea are adjudged alike under

[1] The manufacturer of Zoloft, Pfizer Pharmaceuticals, says that while some symptoms "might start to improve within one to two weeks...it could take up to eight weeks" for the drug to take effect. "What to Expect on Zoloft," http://www.zoloft.com (at About Zoloft -> What to Expect on Zoloft).

[2] An incompetent inmate, even one who has exhausted his appeals, cannot be executed. Ford v. Wainwright, 477 U.S. 399 (1986).

RCr 8.06 and KRS 504.100. Thompson v. Commonwealth, 56 S.W.3d 406 (Ky. 2001); See also Godinez v. Moran, 509 U.S. 389 (1993). But Thompson and Godinez addressed far different situations from that presented here. Those defendants may have pled guilty, but did not do so in an attempt to have the state fulfill a desire to commit suicide as Marc Chapman did. This Court must review the punishment imposed under these circumstances.

In holding competency to plead guilty or proceed *pro se* is no different than competency to stand trial, the Court in Godinez said both situations hinge on "whether the defendant has `sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a `rational as well as factual understanding of the proceedings against him.'" 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). But the context of the plea is critical. There is great significance in what Chapman sought to accomplish here – his death – by waiving his right to counsel, to a trial and the presentation of mitigating evidence. Chapman did not plead to advance any defense-oriented goal, but to give up on the litigation so he would be killed. Not only did this constitute an abandonment of all efforts to defend himself, it simultaneously undercut the Commonwealth's independent sovereign interest in sentencing reliability.

Competency to participate with counsel to advance a defense is not the same as competency to give up and decide to die. See Rees v. Peyton, 384 U. S. 312, 314 (1966) (*per curiam*). Under Rees, capital defendants are competent to make such decisions only if they have the "mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence."

Ashworth v. State, 706 N.E.2d 1231, 1241 (Ohio 1999) (relying on Rees); see Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000) (noting "differ[ence]" between competency to stand trial and competency to abandon litigation, although both tests inquire "about the discrete capacity to understand and make rational decisions concerning the proceedings at issue").

As a reasonable choice, pleading guilty to obtain a negotiated settlement for a conviction of an offense less than that charged or for a lesser penalty is completely different from choosing to plead guilty to all offenses charged and waiving all rights and evidence to "bargain" for the ultimate sanction of death. This Court has said "it is entirely rational to plead guilty to a judge in the hope of receiving a more lenient sentence than from a jury." Johnson v. Commonwealth, 103 S.W.3d 687, 695 (Ky. 2003). The converse may not be true, particularly when suicide is the goal. There is a compelling interest in this circumstance for the state to ensure this decision is rational, for on its face it is not.

Some maintain the desire to seek death is *per se* evidence of incompetence, based on the view that a rational person, if given a choice, will always prefer life over death. Hugo Bedeau, *The Courts, The Constitution, and Capital Punishment*, 122 (1977); Kathleen Johnson, "Note, The Death Row Right to Die: Suicide or Intimate Decision," 54 Cal. L. Rev. 575, 592 (1981). A defendant's "election to represent himself for the purpose of acquiescing in his conviction of a capital offense and in his death sentence cannot be sanctioned as an intelligent choice." State v. Shank, 410 So.2d 232, 233 (La. 1982).

Even if this Court does not take this view of inherent incompetence, the questionable rationality of choosing to die must require heightened scrutiny, particularly here where Chapman's stated intention was to commit "suicide by court." The Commonwealth has an interest in determining the decision and imposition of the death penalty has the highest of reliability. See generally Martinez v. Court of Appeal of California, 528 U.S. 152, 162 (2000).

A presumptively innocent defendant may choose an unwise, even destructive, course of action, including pleading guilty, so long as the defendant has a "present ability to consult with his lawyer with a reasonable degree of rational understanding' and [has] a `rational as well as factual understanding of the proceedings against him."' Godinez, 509 U.S. at 396. In other words, when evaluating the validity of a defendant's waiver of a guilt-phase right, courts must respect the competent defendant's choice irrespective of the probable guilt-phase consequences. But this cannot be so with a defendant's suicidal decision, where the balance of interests shifts. Courts must consider the consequences of a capital defendant's desire to use the court to accomplish his suicide because the sovereign's reliability interest in capital sentencing disallows judicial agnosticism toward outcomes as prevails in the guilt phase. Compare Faretta v. California, 422 U.S. 806 (1975) (right to self-representation in guilt phase) with Martinez, 528 U.S. at 162 (no right to self-representation on appeal because conviction destroyed presumption of innocence).

C. The Standard for Adjudging Competency When a Defendant Pleads to Die Requires a Deeper and More Thorough Inquiry Into the Mental State of the Defendant.

The Supreme Court in Rees articulated a framework for evaluating the competency of a defendant to abandon litigation, waive all rights and mitigating evidence, and acquiesce in his execution. This requires a more intrusive inquiry than determining the competency to waive guilt phase rights alone. Rees involved a death-sentenced defendant's request to withdraw a certiorari petition. Refusing to accede to the defendant's wish, the Supreme Court directed the district court to "determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. at 314. The Court's directive to the trial court to evaluate competency within the context of what the defendant actually sought by waiving (i.e., evaluate "competence in the present posture of things") reveals that, in the capital context, an attempt to achieve a suicidal waiver is not acceptable simply because that defendant understands the proceedings and may abstractly be able to assist counsel.

Competency to waive everything, including one's life is, in other words, qualitatively different from simply waiving guilt-phase rights because it has nothing to do with the defendant's ability to assist in his defense. Aided by counsel, a guilt-phase defendant who is ill-equipped to make complex evidentiary decisions is protected against his own inadequacies so the more intrusive Rees-type inquiry is unnecessary. But it is quite another matter to conclude a capital defendant is necessarily competent to waive all of his rights and give up his life simply because he is equipped to "consult" and "assist" his lawyers. After all, a defendant who wishes to give up completely and choose death is

neither consulting nor assisting counsel, nor attempting to act as counsel himself, but trying to thwart an adversarial adjudication on his behalf.

This Court has recognized these differences.

> Even if a defendant is found competent to stand trial, he may not be capable of making an intelligent decision about his defense. Under our statutes, one is competent to stand trial if he or she possesses the "capacity to appreciate the nature and consequences of the proceedings against one [and] to participate rationally in one's own defense." KRS 504.060(4). It is possible that a defendant found competent to stand trial might be unable to comprehend the consequences of choosing not to use the insanity defense, thus rendering the defendant incapable of intelligently waiving the defense. The accused might also suffer a mental disability which would make it difficult or impossible "to recognize his or her present condition."

Dean v. Commonwealth, 777 S.W.2d 900, 908 (Ky.1989)(citing Frendak v. United States, 408 A.2d 364, 380 n. 29 (D.C.1979).

As to the waiver of the presentation of mitigating evidence in a death penalty case, this Court has gone further.

> [T]he right to waive mitigating circumstances during the penalty phase of a trial is inherently different from the right to waive a defense inconsistent with a claim of innocence during the guilt phase.

Soto v. Commonwealth, 139 S.W.3d 827, 857 (Ky. 2004). The waiver of mitigating evidence must be voluntary and intelligent. Id. at 855. This includes a determination of whether the defendant is competent to make the waiver of mitigation. St. Clair v. Commonwealth, 140 S.W.3d 510, 560 (Ky. 2004)

What this all means is that defining competency in terms of appreciating the nature and consequences of the proceedings and consulting and assisting counsel has no place here, which explains why a Rees-derived competency framework has to do with whether trauma or some cognitive or emotional impairment has affected the defendant's

ability to reason through the choice between life and death. See Miller v. Stewart, 231 F.3d 1248, 1250 (9th Cir. 2000) (applying Rees standard because competency in guilt-phase context "raises different questions and requires different findings than whether someone is competent to elect to die").

D. The Rees Standard Applies Anytime a Capital Defendant Wishes to Die.

Courts that have allowed a defendant to waive appeals and volunteer for execution apply Rees when determining competency. State v. Berry, 659 N.E.2d 796, 796 (Ohio 1996); see also State v. Berry, 686 N.E.2d 1097, 1101 (Ohio 1997) (describing the Ohio standard as "a more specific definition of the general terms used in Rees"). Later, the Ohio court ruled the same standard applied to capital defendants seeking to waive mitigation.

> If a defendant chooses to waive the presentation of all mitigating evidence, as [the defendant] did here, and the issue of competency is raised, the standard used to determine competence is as follows: A defendant is mentally competent to forgo the presentation of mitigating evidence in the penalty phase of a capital case if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence. The defendant must fully comprehend the ramifications of his decision, and must possess the ability to reason logically, i.e., to choose means that relate logically to his ends.

State v. Ashworth, 85 Ohio St.3d 56, 706 N.E.2d 1231, 1240 (Ohio1999)(citing Berry, 659 N.E.2d 796).

The Oklahoma Court of Criminal Appeals reached the same conclusion in a death penalty case, viewing waiving trial rights and pleading for death, waiving appeals to volunteer for execution and waiving the presentation of mitigation as fundamentally similar. The court applied a Rees derived standard to these situations:

> [W]e find merit in establishing guidelines to assist trial courts in dealing with a situation such as the one presented here. These guidelines must be used both in guilty/nolo contendere pleas and in a trial when a defendant refuses to allow the presentation of mitigating evidence in the sentencing stage. Pursuant to Grasso, the court must fully determine a defendant is competent to waive the right to an appeal. There, we said: "[A] defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." This is the basic standard we use here.

State v. Wallace, 893 P.2d 504, 512 (Okla. Crim. App. 1995) (quoting State v. Grasso, 857 P.2d 802, 806 (Okla. Crim. App. 1993)).

E. The Eighth Amendment Demands a Heightened Standard for Evaluating Competency When a Capital Defendant Pleads for Death.

Beyond a consideration of the applicability of Rees, this Court must recognize the constitutional difference between pleading guilty and pleading for a death sentence. Choosing to plead guilty and seek the ultimate penalty makes the entire process have deadly consequences. This implicates the Eighth Amendment and concerns the most important value our system protects - life itself. This is why heightened reliability is demanded. In fact, this Court is free "to adopt competency standards that are more elaborate" than that set out in Rees. Godinez, 509 U.S. at 402. Even if this Court decides not to follow the precise standard set forth in Rees, this Court must adopt some standard, with Rees as its base, that takes a defendant's horrible social history, serious mental illnesses and suicidal intention into account in determining whether the defendant is competent to plead to die, not just whether he is competent to waive guilt phase rights. The framework for this standard is derived from Soto, supra, and St. Clair, supra.

F. The Trial Court Applied a Guilt Phase Waiver Standard to Determine Chapman's Competency to Plead for Death.

The trial court here applied a simple guilt phase standard to determine only that Chapman was competent to stand trial, and made a knowing, intelligent and voluntary waiver of his right to counsel. The court said it found that there was no mental condition that affected Chapman's ability to "appreciate his legal situation" or to "understand the nature and consequences of the proceedings against him or...to participate in his own defense." Tape 11; 12/05/04; 3:40:53. Chapman, the court, said was "competent to stand trial and "to participate in these proceedings," "to fire his attorneys" and to "choose to represent himself." Id. Although the court said it took into account Chapman's medical and mental condition, it did not elaborate, nor did it do so in terms of what Chapman was seeking – "suicide by court" by waiving all of his rights and the presentation of mitigating evidence.

The court did not take into account at all Chapman's competency to choose his penalty of execution, nor the Commonwealth's interest in ensuring that the requirement of the Eighth Amendment for heightened reliability be satisfied. This Court is mandated to review all death sentences to determine whether they meet the heightened reliability required by the Eighth Amendment. See KRS 532.075. The requirement for the trial court is no different. The Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Chapman's abysmal history, which included long standing depression, severe physical, sexual and emotional abuse, and multiple suicide attempts, and the affect of all of this on his decision to ask the state to help him finally succeed at killing himself was never considered using the heightened standard mandated by Rees. His medical and

mental condition were only considered with regard to his waiver of a trial and counsel. The court never determined in the proper context and with the required standard Chapman's "mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Rees, 384 U.S. at 314. The court did not ensure that Chapman's desire to die was not the result of his untreated depression. Stated simply the court did not determine if Chapman's mental illnesses and death wish impaired his "capacity to understand the choice between life and death." Franz v. State, 754 S.W.2d 839, 843 (Ark. 1988) (interpreting Rees). This was critical since Chapman considered one choice alone from the outset of the case – suicide.

G. Chapman Must Be Treated for His Depression and a New Competency Determination Must Be Made.

The trial court's failure to require that Chapman be treated and to make an adequate determination of his competency to plead to die using the correct standard was a violation of constitutional magnitude. 5th, 6th, 8th, 14th Amendments, United States Constitution; §§ 2, 7, 11, 17, Kentucky Constitution. This Court must remand this case to the trial court with a direction that it consider Chapman's competency under the standard of Rees and only after Chapman has received the treatment required to allow an adequate determination to be made. Actually, once treatment is afforded Chapman's demand that he be killed might not be made.

2. THE TRIAL COURT DID NOT MAKE A PROBING INQUIRY INTO MARC CHAPMAN'S REASON FOR WANTING TO BE KILLED, WHAT MITIGATING EVIDENCE COULD BE PRESENTED, AND WHETHER CHAPMAN EVEN RECALLED THE CRIMES. THE COURT DID NOT ENSURE A KNOWING, INTELLIGENT AND VOLUNTARY PLEA OF GUILT AND FOR DEATH.

This issue is unpreserved. This Court must review it regardless due to the requirement of KRS 532.075 that "the punishment" be reviewed, including whether "evidence supports the...judge's finding of aggravating circumstances" and "the factual substantiation of the verdict." KRS532.075(2), (3)(b), (8).

A. The Trial Court's Colloquy With Marc Chapman Was Inadequate.

During the guilt and death plea colloquy, Marc Chapman was asked about each of the charges against him, as well as the aggravating circumstances, and whether he acknowledged he committed the offenses and aggravating factors. He said he did by simply answering "yes." Tape 11; 12/07/04; 4:47:00-4:57:30. Chapman later stated "I don't know exactly what happened that night." Tape 12; 12/14/04; 3:38:32. Dr. Steven Free testified Chapman's memory of the events was not complete. Tape 9, 10/1/04, 9:42:49 – 9:43:20.

Chapman was also asked about whether he knew he had the opportunity to present mitigating evidence. Tape 11; 12/06/04; 4:34:55. The court then listed the statutory mitigating circumstances and asked if Chapman understood that he could present these circumstances to the court or the jury. Id. The court later asked Chapman if he understood that if he proceeded with a jury he "would be able to present mitigating evidence." Id. at 4:56:00. Chapman said he understood this.

A more probing inquiry should have been made into how Chapman' desire to die figured into his ability to make a competent choice between life and death. (See Argument 1). Chapman appeared to simply be saying what he knew he needed to say to accomplish his suicide – a suicide he contemplated from the time of his arrest, and even before the crimes were committed.

B. Chapman was Never Asked if He Knew What Mitigating Evidence Specific to His Case He Could Present

Although Chapman was asked generally if he knew the statutory mitigating circumstances and told he could present those to the court or jury if he chose not to waive his right to do so, the court never asked Chapman if he was aware of the mitigating evidence specific to himself and the case that could be presented to support these or any other mitigating circumstances. This rendered he plea unknowing and unintelligent.

Even if a defendant may have the personal right to waive the presentation of mitigating evidence it must be knowingly, intelligently and voluntarily done, and that must be determined by the court. Soto v. Commonwealth, 139 S.W.3d 827, 855 (Ky. 2004). This Court has set out precisely the colloquy that must occur when a defendant desires to waive the presentation of mitigating evidence. "If a defendant wishes to do so...it is incumbent upon the trial court to determine, on the record, whether he or she is competent to make such a waiver and whether the decision to do so is knowing and voluntary." St. Clair v. Commonwealth, 140 S.W.3d 510, 560 (Ky. 2004)(citing Jacobs v. Commonwealth, Ky., 870 S.W.2d 412, 418 (Ky. 1994).

> In making this determination, a trial court should:
> (1) inform the defendant of the right to present mitigating evidence, and what mitigating evidence is; (2) inquire both of the defendant and his attorney (if not pro se) whether he or she understands these rights; (3) inquire of the attorney if he or she has attempted to determine from the

> defendant whether any mitigating evidence exists; (4) **inquire what that mitigating evidence is** (if the defendant has refused to cooperate, the attorney must relate that to the court); (5) inquire of a defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence in a capital sentencing scheme, understands such evidence could be used to offset the aggravating circumstances proven by the prosecution in support of the death penalty, and the effect of failing to present that evidence; (6) after being assured the defendant understands these concepts, inquire of the defendant whether he or she desires to waive the right to present such mitigating evidence; and (7) make findings of fact regarding the defendant's understanding and waiver of rights.

St. Clair at 560 -561 (emphasis added).

A higher standard of waiver applies to giving up defenses than simply whether the defendant is competent to stand trial. Dean v. Commonwealth, 777 S.W.2d 900, 908 (Ky.1989)(citing Frendak v. United States, 408 A.2d 364, 380 n. 29 (D.C.1979). An even higher waiver standard must be utilized when it is the presentation of mitigation that is being waived in a death penalty case. Soto v. Commonwealth, 139 S.W.3d 827, 857 (Ky. 2004). A waiver of mitigation that is not determined under this higher standard is not knowing, intelligent and voluntary. Id. at 855. (See also Argument 1, incorporated herein by reference.)

C. Chapman was Never Asked To Provide a Factual Basis for the Crimes to Which He was Pleading.

Chapman's single-minded determination to obtain the state's assistance in his suicide, despite not recalling what he had done, is not simply a reflection on the question of whether he was competent to plead for his death. Chapman's lack of memory illustrates he could not and did not acknowledge or establish a factual basis for his plea. "[T]he sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge."

Santobello v. New York, 404 U.S. 257, 261 (1971); ABA Standards Relating to Pleas of Guilty, Section 1.6. A Boykin inquiry should include a declaration by the defendant in open court of the facts upon which guilt is based. State v. Enoch, 887 P.2d 175, 178 (Mont. 1994).

At Chapman's plea, the trial court did not ascertain a factual basis for the charges from any source, let alone from Chapman. This was not a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), in which a defendant pleads guilty, but does not acknowledge commission of the charged crimes. It was a guilty plea, but also a plea Chapman made to fulfill his wish to die. At no time during the death plea colloquy did the trial court ask Chapman to describe his conduct on the night in question. If he had been asked to state a factual basis for the offenses, Chapman would not have been able, because he had no memory of the offenses.

The trial court failed to make a record that established Chapman's admission to the facts necessary to prove the offenses. Chapman's monosyllabic responses of "yes," to leading questions by the court, were inadequate to demonstrate this factual basis, particularly in light of Chapman's determination from the outset of the case to be killed "whatever" he had done. Tape 12; 12/14/04; 3:38:32.

D. The Trial Court's Superficial Colloquy with Chapman Rendered His Plea Unknowing, Unintelligent and Involuntary.

Even if Chapman was competent to plead guilty and plead to die, the court was required to "indulge every reasonable presumption against [finding a] waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A court must examine a defendant thoroughly enough to ensure the waiver is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Colorado v.

Spring, 479 U.S. 564, 573 (1987). It is the quality of the colloquy that matters, not the quantity of formulaic questions asked. Thus, if the record raises doubts about a capital defendant's waiver being knowing and intelligent, the trial court must, before accepting a plea, engage in a thorough, targeted, and penetrating colloquy to dispel the possibility the defendant is making a plea that is not knowing, intelligent and voluntary. See Godinez v. Moran, 509 U.S. 389 (1993); Von Moltke v. Gillies, 332 U.S. 708 (1948); Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998) (en banc). Lengthy questioning that merely shows the defendant might be competent to plead guilty does not suffice. See Godinez, 509 U.S. at 400-02.

Godinez teaches that competency to waive an important right does not itself mean the waiver is knowing, intelligent, and voluntary. See also Dean v. Commonwealth, 777 S.W.2d 900, 908 (Ky. 1989). Apart from competency, "a trial court must satisfy itself that the waiver of [the defendant's] constitutional rights is knowing and voluntary." Godinez, 509 U.S. at 400. "' The Supreme Court demands a "sliding scale" approach, in which the depth of the colloquy depends upon the interests at stake. See Patterson v. Illinois, 487 U.S. 285, 298-99 (1988). Here, Marc Chapman was pleading guilty to a death sentence in order to be killed - he was seeking "suicide by court." There could be no more important interest at stake, both for Chapman and the Commonwealth to ensure the heightened reliability necessary for the infliction of the ultimate punishment.

Von Moltke v. Gillies shows that assessing knowingness of a waiver is no less important simply because the capital defendant may be intelligent and articulate. In Von Moltke an "intelligent, mentally acute" defendant pled guilty to espionage, and exposed herself to the death penalty. 332 U.S. at 720-21. In ruling the trial court failed to make a

thorough inquiry into the validity of her waivers, the Supreme Court explained that a trial judge must ensure a defendant - no matter how articulate, clear-headed, and intelligent - understands fully what is being waived: "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a **penetrating and comprehensive examination** of all the circumstances under which such a plea is tendered." Id. at 724 (emphasis added). And the more complex the issues surrounding the waiver, the more penetrating and comprehensive the colloquy must be. See Id.

In Wilkins v. Bowersox, supra, the defendant sought to waive mitigation and ask the jury to give him the death penalty. 145 F.3d at 1009-10. To accomplish that goal, he discharged his attorney and proceeded *pro se*. Id. Because the waiver of counsel and the mitigation waiver were intertwined to pursue a single goal – to be killed - the Eighth Circuit Court of Appeals treated those waivers as indistinct and found both invalid. The trial court's colloquy, which "consisted predominantly of leading questions that failed to allow [defendant] to articulate his reasoning process," and in which the defendant did not speak meaningfully about his understanding of what he was waiving, was flawed because it did not "penetrate the surface":

> While [defendant's] simple "yes" and "no" answers indicated an intention to waive his right to counsel, this does not conclusively establish that his waiver of counsel was valid. A judge has an obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily.

Id. at 1012 (quoting Von Moltke, 332 U.S. at 724) (emphasis added).

Leading questions by the court answered by Chapman with simple yes and no responses were not sufficient. Chapman did not even remember what he had done and the court did not establish what he did. Chapman did not enter a knowing, voluntary and

intelligent guilty plea to these offenses and to death and the trial court did not ensure that it was. The trial court's failure was a violation of constitutional magnitude. 5th, 6th, 8th, 14th Amendments, United States Constitution; §§ 2, 7, 11, 17, Kentucky Constitution. His convictions and sentences must be vacated.

3. THE STATE'S OBLIGATION TO ENSURE RELIABLE CAPITAL SENTENCING OVERRIDES MARC CHAPMAN'S PERSONAL WAIVER OF MITIGATING EVIDENCE.

This issue is preserved by defense counsels' argument to the trial court:

> "Your honor, as the court is aware, the Supreme Court jurisprudence in this country, in cases like Woodson v. North Carolina, indicates death penalty cases are different. There should be, and there are, additional protections against the arbitrary or capricious imposition of the death penalty. To comply with the 8th Amendment, a death sentence must be based on a rational, reasoned, well-founded determination that the death penalty is reliable and proportionate. The safe guard, the fail safe in this process, is this adversarial system, the right to a jury trial, the right to assistance of counsel, the right to present a defense, the right to present mitigation. Mr. Chapman is trying to circumvent the safe guards in our system. . . . To by-pass the Constitutional safe guards established to ensure that death sentences and executions in this country are reliable, proportionate and not arbitrary, your honor, we should not be a part of this." Tape 11, 12/7/04, 3:32:40 – 3:36:28.

Reliability in capital sentencing is no mere precatory aspiration for the sake of the defendant. With the sovereign right to execute as society's response to certain crimes, the state must ensure, as a compelling interest of its own, that the sentencer considers available mitigating evidence so it can, with appropriate moral judgment, decide whether a defendant should die. The legitimacy of lethal punishment depends upon it.

Giving a capitally-convicted defendant the power to veto a penalty-phase presentation of available mitigating evidence sabotages that process - and thus undercuts the legitimacy of our capital scheme - because it hinders the jury's or judge's ability to

fulfill its statutory role in sentencing in a meaningful way. Muhammad v. State, 782 So. 2d 343, 361-62 (Fla.), cert denied, 122 S. Ct. 87 (2001). Thus, when the trial court gave Marc Chapman veto power over the presentation of mitigation, it effectively gave him the power to override this state's independent sovereign interest in reliable capital sentencing.

Though unquestionably true that a capital defendant has a constitutional entitlement to sentencing reliability, that right is not, like many other rights, freely waivable in deference to the defendant's freedom to choose how certain basic aspects of the defense case will be handled. Relying only on the paradigm of free choice lops off one half of the equation: the sovereign's own interest in ensuring capital punishment's fair and reliable application. The sovereign's interest runs deep because "taking the life of one of its citizens" is the ultimate sovereign act - the most extraordinary exercise of state power.[3] Gardner v. Florida, 430 U.S. 349, 358 (1977). So, in the case at bar, the trial court misstated the issue when it characterized it as only one of free choice.

Properly framed, the issue here is: *Who controls what the sentencer may consider - the convicted capital defendant or the Constitution and statutory laws governing capital sentencing?* In an adversary system committed to the rule of law, there would seem to be only one possible answer: "[U]nder our form of government it is not the inmate on death row or the accused who determines when and whether the State shall execute a prisoner; rather, the law itself makes that determination. The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants." State v. Martini, 677 A.2d 1106, 1107 (N.J. 1996). After all, "the waiver

[3] The legal authority to kill its own citizens under certain circumstances is one of the defining characteristics of a state's sovereignty. Indeed, political philosophers from Hobbes, Locke, and Rousseau down to the present day have suggested that it is the defining characteristic. See generally Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998) (D. Heller-Roazen, trans.).

concept was never intended as a means of allowing a criminal defendant to choose his own sentence.... The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue - the propriety of allowing the state to conduct an illegal execution of a citizen." Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) (denying capital defendant's attempt to waive statutory appeal rights). The sovereign's "overwhelming interest in insuring that there is no mistake in the imposition of the death penalty" therefore demands as a matter of public policy that "mitigating factors must be introduced, regardless of the defendant's position." State v. Koedatich, 548 A.2d 939, 995, 997 (N.J. 1988).

Defense counsel urged the trial court not to permit Marc Chapman to waive his rights to counsel, jury sentencing, and presentation of mitigation and, thereby, by-pass the Constitutional safe guards established to ensure that death sentences and executions in this country are reliable, proportionate and not arbitrary. The trial court ultimately ruled Chapman's freedom to abandon an adversarial presentation of mitigation trumped the sovereign's compelling interest in systemic integrity and reliability. Tape 11, 12/7/04, 3:40:50 – 3:44:06; Tape 12, 12/14/04, 3:26:16 – 3:31:00.

That ruling flouts Kentucky's tradition of preserving the sanctity of capital sentencing procedures. Our state and federal constitutions, this Court's jurisprudence, and the proper functioning of our own capital scheme, demand that our state choose systemic reliability and integrity over whatever free-choice interests a capital defendant may have in waiving mitigation. All compel the conclusion that the presentation of mitigation to the sentencer is a nonderogable obligation that falls to the sovereign when the defendant chooses not to exercise his personal right to do so.

The trial court's response to Marc Chapman's request to waive assistance of counsel, jury sentencing and presentation of mitigation and plead for death was that it was a simple matter of free will and freedom of choice. While the trial court stated it shared defense counsel's 8th Amendment concerns, it held "a person must be allowed to exercise their free will if the choice is a legal one. The death penalty is a legal one in the state of Kentucky for your particular crimes and under the present state of the law you are free to choose it." Tape 12, 12/14/04, 3:29:22 – 3:30:40; Tape 11, 12/7/04, 3:41:00 – 3:44:06.

The basis of the trial court's ruling on Marc Chapman's attempted waivers of counsel, jury sentencing and presentation of mitigation clearly was Faretta v. California, 422 U.S. 806, 834 (1975), Dean v. Commonwealth, 777 S.W.2d 900, 907 - 908 (Ky. 1989), and Jacobs v. Commonwealth, 870 S.W. 412, 417 – 418 (Ky. 1994). Faretta recognized a 6th Amendment right to self-representation: the "right to defend" is "personal" because the "defendant and not his lawyer or the State will bear the personal consequences of a conviction." Based on Faretta, this Court held the presentation of an insanity defense, which undermines the defendant's defense of innocence, to be reversible error where the defendant is competent and capable of voluntarily and intelligently waiving such a defense. Dean v. Commonwealth, 777 S.W.2d 900, 907 – 908 (Ky. 1989); Jacobs v. Commonwealth, 870 S.W. 412, 417 – 418 (Ky. 1994). In such a situation, this Court ruled the defendant must be allowed to be "the master of his own defense and pilot of the ship." Id. at 418.

While Faretta established a constitutional right to self-representation, this right has never been held to be absolute. Id. at 834, n. 46; McKaskle v. Wiggins, 465 U.S.

168 (1984). Faretta itself emphasized the right of self-representation had to be understood as part of an overarching "right in an adversary criminal trial to make a defense as we know it," and not a free-standing right of the defendant to capitulate to the prosecution's allegations. Faretta at 818. In a penalty hearing in which a capital defendant's waiver of mitigation advances the prosecutor's goal, there is not an adversary criminal trial nor is the defendant attempting to make a defense as we know it. There is, accordingly, no basis for recognizing the defendant's right to preserve actual control over the case he chooses to present to the sentencer. Faretta is a "shield for the criminal defendant" but cannot be used as a "sword . . . [to] undermine the adversary process" of penalty phase and thereby undermine its reliability. See People v. Bloom, 774 P.2d 698, 727 (Cal. 1989).

The Supreme Court has refused to extend Faretta to defendants who, through conviction, lose their presumptive innocence, because "the autonomy interests that survive a felony conviction are less compelling than those motivating the decisions in Faretta. Yet, the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interests in self-representation." Martinez v. Court of Appeal of California, 528 U.S. 152, 162 - 163 (2000).

Considering it is the defendant who "will bear the personal consequences" of the sentence, it may be facially tempting to extend the Faretta right of self-representation into sentencing. However, significant other societal interests are at stake. These interests are substantially broader than concern about the fate of the particular offender. Since capital

defendants in a penalty proceeding are no longer presumptively innocent, they no longer have the same right of control over a proceeding as they did before their conviction or entry of a guilty plea. Thus, it would be wrong in a capital penalty proceeding to balance a defendant's entitlement to individual autonomy against the state's heightened interest in sentencing reliability.

Similarly, this Court, recognizing Dean/Jacobs is not available to resolve every disagreement between counsel and client, limited the holdings of those cases to a defendant's right to assert or forego a particular defense. Quarels v. Commonwealth, 142 S.W.3d 73, 78 – 79 (Ky. 2004). Indeed, in Soto v. Commonwealth, 139 S.W.3d 827, 855 – 857 (Ky. 2004), this Court rejected the argument that Jacobs' premise that a defendant's constitutional right to control his defense includes the right to waive the assertion of any defense inconsistent with his claim of innocence, extends to a waiver of mitigating evidence. As this Court stated, "the right to waive mitigating circumstances during the penalty phase of a trial is inherently different from the right to waive a defense inconsistent with a claim of innocence." Id.

It is by now axiomatic that the unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments. Because of this "qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Zant v. Stephens, 462 U.S. 862, 884 (1983) quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). "The [Supreme] Court has accordingly imposed a series of unique substantive and procedural restriction designed to ensure that capital punishment is not imposed without the serious and calm

reflection that ought to precede any decision of such gravity and finality." Thompson v. Oklahoma, 487 U.S. 815, 856 (1988)(O'Connor, J., concurring in judgment).

The Supreme Court has consistently recognized the crucial role of the sentencer's ability to consider and give effect to mitigation in ensuring the death penalty is not imposed arbitrarily or capriciously. Sentencing procedures that give the sentencer individualized information about the defendant and consistent guidelines for applying that information avoid the random, disproportionate imposition of the death penalty. See Argument 4 and cases cited therein. These procedures have been established not only to protect the interests of the accused, but also to enable to the state to effectuate a constitutional death penalty statute.

The trial court's exclusive focus on the 6th Amendment ignored the importance of the 8th Amendment protection of the public interest in reliable, non-arbitrary imposition of sentences of death. The 8th Amendment values cannot be so compromised. "A defendant who prevents the presentation of mitigating evidence withholds from the trier of fact crucial information bearing on the penalty decision no less than if the defendant was prevented from introducing such evidence by statute or judicial ruling." State v. Koedatich, supra at 994 - 995. See Argument 4. The 8th Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver. The waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence, especially where, as here, to do so would result in state assisted suicide. McKenna supra at 441. The state's responsibility to ensure the death penalty will not be imposed in an arbitrary and capricious manner cannot be handed over to the convicted defendant merely because he wishes to see himself executed.

There is an overwhelming state interest in ensuring there is no erroneous, arbitrary, unreliable or disproportionate imposition of the death penalty. That is why this Court has a constitutional and statutory duty to review every judgment of death. KRS 532.075. Without evidence of the relevant mitigation in the record, this Court is without half of the equation that enables it to determine if a sentence of death is appropriate "considering the crime and the defendant." KRS 532.075 (3)(c). This Court would be unable to discharge its constitutional and statutory obligation to review the sentence of death and would fail to safeguard the state's interest in ensuring the reliability of death penalty decision. Permitting a waiver of the presentation of mitigating evidence at the trial level not only precludes a meaningful review by this Court, it also strips the criminal justice system of any possibility of guaranteeing non-arbitrariness in determining who dies. This is tantamount to permitting waiver of appellate review.

> When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence he does not [merely] ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society—that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that the punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation. Whitmore v. Arkansas, 495 U.S. 149, 173 (1990)(Marshall, J., dissenting).

In conclusion, this Court should hold that the Faretta right to self-representation does not extend to capital sentencing, and more specifically, does not extend to preventing the investigation and presentation of relevant mitigating information regarding an offender to the sentencer. Furthermore, even if Faretta does extend to capital sentencing, those interests are outweighed by 8th Amendment considerations. The trial court, by permitting Marc Chapman to withhold from the sentence relevant mitigation,

undermined the integrity of the judicial process, defeated the reliability of the outcome and subverted our adversary system of justice. Marc Chapman, in effect, appropriated to himself a judgment that only society, through a sentencing jury or judge, can properly make after consideration of all relevant evidence. Marc Chapman's death sentences, imposed under such circumstances, cannot withstand constitutional scrutiny and must be vacated. 8th, 14th Amendments, US Constitution; § 1, 2, 3, 11, 17, 26, KY Constitution.

4. TRIAL JUDGE MUST CONSIDER ALL MITIGATION IN RECORD.

This issue is preserved. Tape 11, 12/7/04, 3:32:40 – 3:36:28; Tape 12, 12/14/04, 3:31:09 – 3:32:48; Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation [Sealed EX]; Report of the Trial Judge, § E(13).

Under the 8th Amendment, US Constitution, §§ 2 and 17, KY Constitution, and KRS 532.025(1)(a) and (2), a sentencing trial judge has, at a bare minimum, a duty to consider all possible mitigation contained in the record before imposing sentence in a death penalty case. A primary and recurring theme of U.S. Supreme Court capital cases since Furman v. Georgia, 408 U.S. 238 (1972) is that to withstand constitutional challenge there is a requirement the sentencer consider mitigation when deciding the appropriate penalty. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Sumner v. Shuman, 483 U.S. 66 (1987); California v. Brown, 479 U.S. 538 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987);

Mills v. Maryland, 486 U.S. 367 (1988); McKoy V. North Carolina, 494 U.S. 433 (1990); Penry v. Johnson 532 U.S. 782 (2001); Tennard v. Dretke, 542 U.S. 274 (2004).

In the end, it is the sentencer—and not the prosecutor or the defendant—who must make the difficult individualized judgment as to whether the defendant deserves the sentence of death. The requirement that mitigation be considered by the sentencer is to ensure that reliable, individualized sentencing occur when a life hangs in the balance, Lockett, supra at 606, and to ensure the sentencer function as a link between contemporary community values and the penal system so the determination of punishment properly reflects the evolving standards of decency that mark the progress of a maturing society. Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968); Penry v. Lynaugh, 492 U.S. 302, 340 (1989). The sentencer must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense. Accordingly, the U.S. Supreme Court consistently has condemned the erection of any barriers to full consideration of mitigation without regard to the device by which the barrier was created. Mills, supra at 375; Lockett, supra at 586; Hitchcock, supra at 398-399; Eddings, supra at 104; Skipper, supra at 1. Neither statute, prosecutor, judge nor defendant may stand in the way of a sentencer's consideration of mitigation.

This Court has also recognized the 8th and 14th Amendments require that in death penalty cases, the punishment must be directly related to the personal culpability of the criminal defendant, and that evidence of the defendant's background and character is relevant to that culpability and must be considered by the sentencer. Smith v. Commonwealth, 845 S.W.2d 534, 538, 539 (Ky. 1993).

Kentucky's statutory scheme wisely anticipated and incorporated these mandates. KRS 532.025(1)(a) states "[u]pon conviction of a defendant in cases where the death penalty may be imposed,...the judge **shall hear** additional evidence in extenuation, mitigation, and aggravation of punishment." (emphasis added). Similarly, KRS 532.025(2) states that "[i]n all cases of offenses for which the death penalty may be authorized, the judge **shall consider** ...any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following [enumerated] statutory aggravating or mitigating circumstances which may be supported by the evidence." (emphasis added). In Commonwealth v. Corey, 826 S.W.2d 319, 321 (Ky. 1992), this Court referred to the provisions of KRS 532.025 as "procedural and substantive safeguards" that must be observed. Indeed, this Court has recognized "in those cases where the jury is waived, the judge wears two hats. He both sets the sentence appropriate for the crime and then decides whether the history, character and condition of the defendant would make it appropriate to mitigate that sentence." Bevins v. Commonwealth, 712 S.W.2d 932, 935 (1986).

Even if this Court holds a suicidal defendant can plead for death, this does not mean a trial court "can administer the death penalty by default" in such cases. Farr v. Florida, 621 So.2d 1368, 1370 (Fla. 1993). (Harding, J., concurring). "The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." Id. The constitution and our death penalty statute require the trial court to consider any evidence of mitigation in the record. This "requirement

applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." Farr, supra at 1369. And it does so regardless of how that mitigation has found its way into the record. Id.

The record in the case at bar, as detailed in the Statement of the Case, includes evidence of Marc Chapman's suicide attempts throughout his life and, more importantly, throughout this case. Given this history, his request for the death penalty and refusal to present mitigation amounted to nothing more than a request for what he described as "suicide by court." Despite this—or, more accurately, because of this, it becomes particularly critical that it is the trial court's "independent and informed decision that imposes death and not the decision of a defendant who **uses** the [court] as an instrument for suicide." Farr, supra at 1371 (Barkett, J., concurring). The trial court cannot merely rubber-stamp the defendant's death wish with absolutely no consideration of mitigation as it did here. Tape 12, 12/14/04, 3:23:50 – 3:25:01, 3:30:40 – 3:31:00; 3:31:09 – 3:32:48.

Even in the face of Marc Chapman's refusal to himself present mitigation, the record was full of it. Trial counsel, who were later designated stand-by counsel, advised that trial court there was substantial mitigation in this case. Tape 10, 10/21/04, 4:56:20 - 4:59:00; Tape 11, 12/7/04, 3:31:23 – 3:32:00, 3:32:40 - 3:36:28. Even with a client who was "not especially" cooperative, counsel determined Marc Chapman lacked criminal responsibility, and had defenses and mitigation. Id. As stand-by counsel, they tendered Dr. Ed Connor's psychological evaluation of Marc Chapman for the court's consideration. Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation and Report of Ed Connor (Sealed EX). Dr. Connor

understatedly described Marc Chapman as having a "very chaotic history." Id. As a pre-verbal infant, Marc developed an analeptic depression due to the emotional detachment of his parents. Id. His mother was an alcoholic and his father was a pedophile. Id. Domestic violence was rampant in his home. Id. At the age of three, Marc was sexually abused by his father and began having dissociative states. Id. At the age of eight, Marc began having problems with severe drug and alcohol abuse and was molested by a babysitter. Id. He became sexually active and suicidal. Id. At the age of eleven, he learned of his father's abuse while in counseling and thereafter confused his father's criminal acts with normal homosexual feelings. Id. Marc began acting out. Id. In his teens, Marc was subjected to a violent attempted sexual assault by a group of boys while he was in juvenile prison. Id. As a young man, Marc's drug and alcohol use increased as did his sexual acting out, and the episodes of dissociation continued. Id. Dr. Connor opined that the charged offenses were committed by Marc while in a dissociative state and while under the heavy influence of drugs and alcohol. Id. Marc was suicidal and under the influence of a severe mental illness that had roots deep in his childhood. Id.

The testimony from state psychiatrist Dr. Steven Free at the various competency hearings also placed gripping mitigation into the record. At the first competency hearing, Free testified that to say Marc Chapman had a difficult childhood would be a pleasant way of describing it and that, as an adult, Chapman still suffered from the consequences of his childhood. Tape 9, 10/1/04, 9:49:33 -50. Free found a clear history of depression, substance abuse, pedophilia, other mental illness in the family. Id. at 10:01:55 – 10:31:43. Chapman had been sexually abused by his father, both parents suffered from depression, serious alcohol abuse and mental disorders. Id. Because of his chaotic

childhood, Chapman had conduct disorders and dysthymia as a young child. Id. Medical records stated that Chapman began complaining of headaches at three and encopresis at nine, symptomatic of emotional disturbance in a child. Id. He had early childhood experiences of flashbacks, mind racing and inability to focus. Id. At 14, he was hospitalized due to a suicide attempt. Id. At 14, he was diagnosed with major depression and had symptoms of post-traumatic stress. Id. As a result of the sexual abuse by his father, Chapman experienced early signs of sexual disorders and an obsession with gender identity. Id. He became sexually active at a very early age. Id. He learned to self-medicate with alcohol and drugs in an effort to cope. Id. Chapman's family history pre-disposed him for substance abuse and mental illness and he showed early signs of mental disorders. Id. There were early signs of head trauma—many times Chapman was beaten unconscious by his father; he was hit on the head with a cast iron skillet by his mother; he was thrown into walls and punched. Id. His parents gave him beer and alcohol in his baby bottle. Id. He was using alcohol and marijuana by eight or nine, and LSD, embalming fluid and PCP by 14. Id. Chapman had frequent thoughts of suicide, racing thoughts, dramatic mood swings and depression—all symptomatic of bi-polar disorder. Id. As an adult, he reported visual hallucinations, an inability to control his actions and sexual preoccupation or gender identity confusion. Id. Chapman had adult head injuries close in time to the crime. Id. A sixteen foot 2 x 4 hit him on the head as it fell from a second story roof. Id. He lost consciousness and later ripped out a wall at the construction site. Id. As an adult, he abused heroin, cocaine, crack, and methamphetamine, and was a binge drinker. Id. The MMPI scores demonstrated a cry for help and that Chapman was in acute psychological turmoil. Id. Free diagnosed

Chapman as suffering from substance dependence, dysthymic disorder, post-traumatic stress disorder, intrusive thoughts, odd sensory experiences, and personality disorder (he had symptoms of both borderline and anti-social disorders). Id. at 9:48:18 – 9:49:33; 10:52:50 – 10:54:09. Dr Free testified Chapman needed and should have counseling. Id.

At the second competency hearing, Dr. Free testified his previous report stated that Marc Chapman had almost daily thoughts of suicide and several previous suicide attempt. Tape 10, 10/21/04, 3:20:40 -3:26:15. He described his previous attempt to escape from the deputy as a suicide attempt. Id. Chapman had mild to moderate vegetative symptoms of depression as well as suicidal preoccupation. Id. His insight and judgment were impaired. Id. The report refers to Chapman hearing voices and having racing thoughts, fairly dramatic mood swings, troubling thoughts/dreams/fantasies, feelings of hopelessness and worthlessness, and a heavy burden of guilt. Id. The report further indicated that at 14, Chapman tried to hang himself and tried to cut his wrists. Id. Free's report stated that Chapman said he was thinking about suicide depending on how his case turned out. Id. Free's report noted that persons with similar psychological profiles to Chapman are described as exhibiting psychotic symptoms and increasingly impaired contact with reality. Id.

Chapman's own words established significant mitigation. In his letter to the court, he wrote, "I don't understand why these crimes occurred...." Tape 10, 10/21/04, 4:28:59 – 4:31:35: Letter to Judge (Sealed EX). He advised the court he was under the influence of alcohol and drugs at the time of the crime. Tape 12, 12/14/04, 3:23:13 -35. He stated, "I don't know exactly what happened that night. Id. at 3:38:32 – 45. Dr. Free, at the very first competency hearing, testified Marc Chapman's memory was not

complete for that time period. Tape 9, 10/1/04, 9:42:49 – 9:43:20. Marc Chapman's heartfelt expressions of remorse were also compelling "of record" mitigation. In his letter to the judge, he wrote:

> I only wish for the Marksburys to start to heal instead of putting them through even more pain, humility, and suffering. I know with my death they will once again feel safe from the nightmares I have inflicted upon them.
>
> I don't understand why these crimes occurred and I only want to finally end all the pain and suffering in all of thoes around me. I am so sorry and remorseful for the crimes I have commited that the pain and guilt have become to much for me to bare. I have had a troubled life but in doesn't give me the right or excuse to inflict pain on others. Especially children.
>
> I feel with me being executed is the only way that the Marksburys will have peace of mind as well s me. That may sound selfish on my part but truely I only want this to be over with so they can finally have closure and begin to heal. Tape 10, 10/21/04, 4:28:59 – 4:31:35: Letter to Judge (Sealed EX).

At sentencing, Marc Chapman reiterated these sentiments:

> This is something I wanted to say since day one. It probably means nothing, but I do want to apologize to Caroline Marksberry, to her family, her children and to everybody I've hurt. I don't know exactly what happened that night, though whatever I did, all I know is I can't undo what I've done. She is right; it is not honorable for me to do what I am doing....But I have known what I am doing for her, for Courtney, Cody and Chelbi. I did know them before this happened and she may not believe it or anybody else, but I did love them kids. I loved them all very much. There is no amount of guilt or sorrow I can feel fro them. Tape 12, 12/14/04, 3:38:06 – 3:40:00.

Despite the constitutional and statutory mandates, the trial court in this case announced he would not consider mitigation. Tape 12, 12/14/04, 3:31:09 – 3:32:48. Instead, because Marc Chapman requested a death sentence in the form of "suicide by court" and death was within the authorized sentence range, the court simply administered the death penalty by default, abdicating his essential constitutional role in the sentencing

process. The trial court's belief that it had no independent role and could only acquiesce to Marc Chapman's death wish for "suicide by court" erected a barrier to full consideration of mitigation and compromised the reliability of the sentence imposed. Marc Chapman's death sentences cannot withstand constitutional scrutiny and must be vacated. 8th, 14th Amendments, US Constitution; § 2, 17, KY Constitution.

5. PROCEDURES MUST BE ESTABLISHED TO PROTECT THE INTEGRITY AND RELIABILITY OF THE DEATH-SENTENCING PROCESS FOR WHEN CAPITAL DEFENDANTS PLEAD FOR DEATH AND WAIVE THEIR PERSONAL RIGHT TO PRESENT MITIGATING EVIDENCE.

This issue is preserved by the trial court's request for a procedure to constitutionally manage a capital defendant's attempts to plead for death and waive presentation of mitigation. Report of the Trial Judge, § E(13). Additionally, this Court has the authority and duty under KRS 532.025 and 532.075 to devise a workable solution under its supervisory power to give effect to our capital sentencing statute.

Our current statutory scheme and case law do not provide an adequate means of protecting the state's interest in the reliability of its capital process when a capital defendant personally chooses to not present mitigation. This quagmire could arise, as it did here, when a capital defendant attempts to negotiate a plea for death, and seeks to waive trial, the assistance of counsel, jury sentencing and the presentation of mitigation. It could also arise in the course of a more typically tried capital murder case where, upon conviction, a defendant personally chooses to waive presentation of mitigation and may or may not also seek to waive jury sentencing and the assistance of counsel.

It is important to first state what is not being advocated here. We do not contend defense counsel defy a client's wishes by presenting mitigation or otherwise shackle a defendant's attempt to express his personal sentencing outlook—to the extent it is admissible—to the jury. Such a solution, by imposing upon defense counsel conflicted loyalties, would only undermine an already difficult relationship, breeding mistrust where nurturing trust is often elusive. See State v. Koedatich, 548 A.2d 939, 995 – 998 (N.J. 1988)[4]. Nor do we advocate relying upon the trial court to provide the mitigating evidence to the sentencing jury or itself. Such a partisan role ill suits a trial court and risks confusing a jury. Introducing mitigation to a jury by means of a presentence investigation report would also seem to be foreclosed. Such a report would be hearsay and additionally would fit badly into the adversarial method of promoting an accurate life-death decision. Finally we do not advocate that the prosecution—even with its obligation to pursue justice—can vigorously advocate for death and then switch roles to forcefully and persuasively offer mitigating evidence.[5]

A. Determination of Competency to Waive. Where a capital defendant seeks to plead for death, waive personal presentation of mitigation or waive assistance of counsel (which is typically done to facilitate a plea for death and waiver of mitigation), the trial court should use the competency standard set out in Rees v. Peyton, 384 U. S. 312, 314 (1966) (per curium). Under Rees, capital defendants are competent in this

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[4] Of course, where counsel and client jointly devise a strategy that entails withholding some, or even all, mitigation, the defendant is not waiving mitigation in the sense that term is used here. Defense counsel must be relied upon in all cases to use their judgment and expertise to detect when their clients' decision to withhold mitigation goes beyond a valid strategy and extends into a desire to thwart the adversarial process. The same obligation would extend to stand-by counsel in cases involving *pro se* defendants; indeed, stand-by counsel would have to use judgment and expertise to detect when a *pro se* defendant is presenting only a slice of the available mitigation to disguise a true desire to undermine the adversarial process (i.e. to accomplish a *de facto* mitigation waiver).

[5] Also see Argument 7 regarding conflicts that arise when the prosecutor plays a dual role as he did here.

situation only if they have the "mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence." Ashworth v. State, 706 N.E.2d 1231, 1241 (Ohio 1999) (relying on Rees); see Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000) (noting "differ[ence]" between competency to stand trial and competency to abandon litigation, although both tests inquire "about the discrete capacity to understand and make rational decisions concerning the proceedings at issue"). See Argument 1.

B. Waiver of Jury. As this Court observed in Commonwealth v. Johnson, 910 S.W.2d 229, 231 (Ky. 1995):

> In death penalty cases, jury sentencing is deeply ingrained in Kentucky law. By virtue of statutes, rules of Court, and decisions, participation by a jury in this momentous governmental event has been regarded as indispensable except upon concurrence of all involved. KRS 532.025; RCr 9.26; RCr 9.84; Gall v. Commonwealth, 607 S.W.2d 97 (Ky.1980). While the importance of a defendant's right to insist upon jury sentencing is obvious, the significance of the public's right of participation in the process should not be taken lightly. As the death penalty is a possible punishment for only the most heinous of crimes, and with due regard for the legitimate public interest in law enforcement, the verdict of a jury should be heard by the court prior to final sentencing except upon agreement of all parties

The situation presented by capital defendants who seek to abandon litigation and plead for death is different than that faced in Johnson. The situation in Johnson was "that one accused of capital murder may be without a defense to the crime charged and wish to plead guilty, but nevertheless may seek punishment other than death from a jury based on a vast array of factors which might lead to such a conclusion." Id. Other defendants, like Mr. Chapman, desire to plead guilty for the sole reason that they want to be put to death. They use the judicial process to commit suicide. A different approach needs to be available to a trial court when confronted with a defendant like Mr. Chapman who

attempts to use the judicial process to commit "suicide by court." "The system of criminal justice should not be available as an instrument of self-destruction." Faretta v. California, 422 U.S. 806, 840 (1975)(Burger, C.J., dissenting).

This Court is urged to prohibit waiver of jury sentencing in those cases where the capital defendant is seeking a death sentence. Arkansas, by court rule, bars waiver of either a jury trial on the issue of guilt or the right to have sentence determined by a jury in a capital case unless the death penalty has been waived by the state. Arkansas Rule of Criminal Procedure 31.4. See Newman v. State, 106 S.W.3d 438, 456 - 457 (Ark. 2003). Much more so than the trial court, a jury functions as a true link between contemporary community values and the penal system, and ensures that the determination of punishment properly reflects the evolving standards of decency that mark the progress of a maturing society. Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968); Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

Such an approach would not allow a criminal defendant like Mr. Chapman to use the judicial process to commit suicide, which is surely against public policy, and at the same time, would ensure the "public's right of participation," Johnson, supra at 231, in the judicial system. See Martin Sabelli and Stacey Leyton, Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System, 91 J.CRIM.L. & CRIMINOLOGY 161, 165 (Fall 2000)(". . . [A]ll persons associated with the criminal process—either as participants in a criminal case or as residents of the jurisdiction—have an interest in ensuring that the process would accord each of us the fullest measure of justice.")

An alternative approach, taken by Ohio, is that in any case where the defendant is charged with an offense punishable with death and the defendant waives his right to trial by jury, "the case shall be tried by a court to be composed of three judges. Ohio Revised Code 2945.06.

C. Counsel. This Court is urged to rule that if counsel is fired or removed at the request of a defendant, the defendant may proceed *pro se* (assuming competency and knowing and intelligent waiver), or counsel other than the fired/removed attorney may be appointed as regular or stand-by counsel to represent the defendant's interests/wishes, or hybrid representation may be allowed. Original counsel, who are in conflict with the defendant over his intent to plead for death, abandonment of litigation or refusal to present mitigation should not be forced to continue represent his interests even as stand-by counsel. See Argument 7.

D. Waiver of Mitigation. This Court should hold that amicus counsel be appointed to serve the sovereign interest in pursuing reliable capital sentencing outcomes by providing a thorough, robust, and adversarial presentation of the case for life, one that suitably challenges the moral conscience of each juror so that whatever the verdict, it reflects a "moral, reasoned response" to all of the relevant facts and circumstances that must be considered in the life-death calculus. Penry v. Lynaugh, 492 U.S. 302, 319 (1989). See Hollaway v. State, 6 P.3d 987, 998 (Nev. 2000) (Rose, C.J., concurring) (advocating appointment of amicus curiae to investigate and present mitigating factors). The prosecution and defense would have full opportunity to cross-examine witnesses called by amicus counsel, and to call witnesses of their own. All three advocates would

be permitted to deliver arguments to the jury or judge. Where necessary, suitable jury instructions could clarify how these somewhat unusual events are to be evaluated.[6]

This solution leaves undisturbed a defendant's personal right to advocate, with or without the aid of counsel, whatever position he deems appropriate. At the same time, it prevents a defendant from dictating *in toto* what mitigating material a sentencing jury or judge can consider.

Concerns about logistics or the public fisc do not pose a barrier. Regardless of the defendant's position on how to handle the penalty phase, defense counsel must still thoroughly investigate and collect mitigation evidence. So, the ensuing delay in securing amicus counsel would not be inordinate because the mitigation investigation, presumably, would be complete, or at least well-developed[7]. Furthermore, amicus counsel would be in a position to evaluate the thoroughness of the mitigation investigation and inform the trial court of possible deficiencies which might call into question the validity of the defendant's mitigation waiver, thereby avoiding possible reversible error on that ground. In the end, the additional costs associated with appointing amicus counsel would pale in

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[6] The Oregon Supreme Court provides a good explanation of the respective roles of the representatives of the three independent interests in a penalty-phase proceeding in which the defendant waives his own interest in reliability:

> In such a situation.... a court can and should instruct appointed [amicus] counsel to present the legal arguments, make the motions and objections, and call and examine the witnesses necessary to make the required record, and it should clearly inform the jury that counsel is acting independently of the defendant and is not permitted to prevent the accused from presenting his own defense, even when counsel thinks the attempt misguided or not responsive to the requirements of the law. Of course, since the state already is represented by the prosecutor, the task of appointed counsel in this public capacity would be to assure effective adversary procedure to test the prosecutor's case against both legal and factual requirements. State v. Wagner, 752 P.2d 1136, 1194 (Or. 1988).

[7] Of course, it would be appropriate for this Court to impose upon defense counsel the obligation to alert the trial court immediately of any meaningful sign that a defendant is inclined to waive the presentation of mitigation evidence. Once alerted, the trial court can promptly appoint amicus counsel.

comparison to the costs associated with lengthy and multiple appeals, including post-conviction evidentiary hearings, where the validity of the waiver and the adequacy of defense counsel's penalty-phase preparation would come under intense scrutiny.

Nor do ethical dilemmas pose a problem. Cf. ABA Criminal Justice Mental Health Standards, Standard 7-4.2 (1989) (defense counsel obliged to raise competency issue over defendant's objection as part of counsel's duty to preserve integrity of judicial process). This proposal does not call for defense counsel to reveal attorney-client confidences to amicus counsel; nor does it require overriding a defendant's doctor-patient or therapist-patient privilege. To the extent the operation of those privileges results in mitigation being withheld from the jury, that is an imperfection in the process the system will have to tolerate. As for defense counsel's refusing to divulge mitigating evidence falling outside the attorney-client privilege, there simply is nothing that suggests defense counsel may do so. The fruits of defense counsel's mitigation investigation are not in and of themselves privileged; indeed, defense counsel may not withhold that information when a trial court probes, as it must, into the adequacy of that investigation to determine the validity of the mitigation waiver. See generally Battenfield v. Gibson, 236 F.3d 1215, 1233 (10th Cir. 2001). Therefore, given that defense counsel must fully investigate mitigation, amicus counsel will likely have the mitigation evidence upon which to build a case for life without having to overcome resistance by the defendant.

There is no perfect solution to the mitigation-waiver problem. Defendants dedicated to undermining the adversarial process will undoubtedly succeed in withholding at least some mitigation evidence from the jury or judge. That is a price the criminal justice system must accept for respecting the autonomy of the individual. But

respecting a defendant's right to "determine his own destiny" does not mean that the criminal justice system should blind itself to the arbitrary results that would ensue when capital juries deliberate (or judge's impose sentence) without the benefit of an adversarial presentation of mitigating evidence in the penalty phase.

In sum, the amicus solution takes seriously what has preoccupied capital jurisprudence in the wake of Furman: that a robust, adversarial penalty phase where available mitigation is presented is essential to the most fundamental aspect of capital jurisprudence-guided discretion through individualized sentencing. See Gregg v. Georgia, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978). Without guided discretion through individualized sentencing, the punishment is unreliable as well as cruel and unusual. The state has an obligation not to allow the imposition of unreliable or cruel and unusual punishment, regardless of the defendant's personal desires. The amicus solution is therefore the best solution because the alternative is unacceptable. See Muhammad v. State, 782 So. 2d 343, 363-365, 370-371 (Fla. 2001).

Conclusion. This Court must vacate Marc Chapman's convictions and sentences and remand the case to the trial court with instructions on how to handle Mr. Chapman's desired waiver of trial, assistance of counsel, jury sentencing and presentation of mitigation. 5th, 6th, 8th, 14th Amendments, U.S. Constitution, § 2, 7, 11, 17, Ky. Constitution.

6. THIS COURT MUST NOT ALLOW MARC CHAPMAN TO USE THE JUSTICE SYSTEM FOR AN ASSISTED SUICIDE.

This issue is preserved by counsel's argument to the court that Marco Chapman was committing suicide by choosing to plead for a death sentence and "we should not be part of this." Tape 11; 12/07/04; 3:34:10.

A. Marc Chapman was Suicidal Nearly All of His Life, Long Before the Crimes in This Case were Committed, When the Crimes were Committed, and When He was Allowed to Enlist the Assistance of the Commonwealth to Carry Out His Death Wish.

Even as a child, Marc Chapman was depressed, emotionally disturbed and suicidal. See Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation and Report of Ed Connor (Sealed Exhibit, hereinafter referred to as such); Tape 9, 10/1/04, 9:49:33-50, 10:01:55 – 10:31:43. His life was chaotic. His parents, both mentally ill alcoholics, were abusive physically and sexually. He was molested by a babysitter. He drank alcohol and smoked marijuana before he was 9 years of age. Sealed Exhibit; Tape 9, 10/1/04, 9:49:33-50, 10:01:55–10:31:43. His ingestion of alcohol started as an infant - his parents put alcohol and beer in his baby bottle. Tape 9, 10/1/04, 9:49:33-50, 10:01:55–10:31:43.

Chapman's mental condition only worsened as he grew. A gang of boys attempted to assault him sexually while he was in juvenile detention, his drug and alcohol abuse increased, and dissociative episodes occurred with more frequency. Sealed Exhibit; Tape 9, 10/1/04, 9:49:33-50, 10:01:55–10:31:43. He had flashbacks, racing thoughts and could not focus. Id. He also had dramatic mood swings and depression – symptoms of Bi-polar Disorder. Id. Chapman was drinking, smoking marijuana, using LSD, PCP and embalming fluid. Id. He had recurring thoughts of suicide. Id. At 14, he was

hospitalized because of a suicide attempt. Id. He tried to hang himself and cut his wrists. Tape 10; 10/21/04; 3:20:40-3:26:15. Major depression and post-traumatic stress were responsible. Tape 9, 10/1/04, 9:49:33 -50, 10:01:55 – 10:31:43

Reaching adulthood, Chapman continued to have serious mental and substance abuse problems. He had gender identity difficulties. He was in acute psychological turmoil. Id. He abused heroin, cocaine, crack, and methamphetamine, and was a binge drinker. Id. He had visual hallucinations and odd sensory experiences, suffered from substance dependence, dysthymic disorder, Post-traumatic Stress Disorder, intrusive thoughts, and personality disorder (with symptoms of both Borderline and Anti-social Disorders). Id. at 9:48:18 – 9:49:33; 10:52:50 – 10:54:09.

Chapman had almost daily thoughts of suicide. Sealed Exhibit; Tape 10, 10/21/04, 15:20:40 -15:26:15. He was preoccupied with killing himself while suffering symptoms of depression. Id. He had poor insight and judgment. Id. He heard voices, had dramatic mood swings, troubling thoughts, dreams and fantasies, and experienced feelings of hopelessness and worthlessness. Id. Persons with similar psychological profiles to Chapman are described as exhibiting psychotic symptoms and have an impaired contact with reality. Id.

The crimes charged may have occurred during one of Chapman's periods of disassociation and while he was very intoxicated on alcohol and drugs. At the time of the crimes he was still suicidal and under the influence of all of the mental illnesses that began in childhood. See Stand-by Counsel's Motion for Court to Consider Attached Sealed Document in Sentencing Deliberation and Report of Ed Connor (Sealed Exhibit).

When Chapman was arrested, he asked the officer who arrested him to shoot him in the head to be "down [sic] and over with it." Commonwealth Exhibit #1, page 3. He told the officer he wished he had the opportunity to kill himself with the sleeping pills he had when arrested. Id., 5. A bullet or the electric chair, he told the officer, was the "only help I can get." Id., 13. He tried to escape from a deputy sheriff before a pre-trial hearing so he would be shot, accomplishing the suicide he desperately wanted. Tape 4; 1/14/03; 12:47:20, Tape 9; 10/1/04; 21:11:00, Tape 10, 10/21/04, 3:20:40-3:26:15. He pleaded, "Shoot me, shoot me!" Tape 6; 3/24/04; 12:20:50. He told Dr. Steven Free he contemplated suicide depending on the course of the case. Id. He told Dr. Free, quite bluntly, he hoped to commit "suicide by court." Tape 10; 10/21/04; 3:33:10.

After Chapman asked to die, the trial judge was so concerned about his psychological problems he ordered psychiatric treatment before he would decide if Chapman was competent to ask to be killed. Dr. Free had said at two different hearings Chapman needed treatment for his depression because it could affect his decision-making. Tape 11; 12/07/04; 2:52:00, 3:16:30, 3:22:00, 3:24:00. But the only treatment Chapman received – which did not have any affect on Chapman's depression – was the drug Zoloft. Tape 11; 12/07/04; 2:42:10, 3:12:00 In ruling Chapman was competent to ask to die, the judge did not take this into account. Tape 11; 12/07/04; 3:40:53.

What all of this means is Chapman had long been suicidal and was still suicidal at the time of the crimes, when he asked to be put to death and when he was allowed by the court to waive his rights and plead to be executed. Whatever additional reasons Chapman stated about why he wanted to be killed only provided more of a basis to carry

out his lifelong death wish. This Court must not allow the Commonwealth to participate in this.

B. Assisted Suicide is Illegal

The Commonwealth has a fundamental and vital interest in ensuring a person facing the death penalty, the most severe and irrevocable punishment possible, receive that punishment and be killed in only the most appropriate cases. Because of this interest a person convicted of a capital crime should not have the right to choose his own death as punishment and thwart a process that has been adopted to determine whether the state should be involved in executing a human being. (See Argument 3). This could not be a more compelling interest in any case in which the defendant is specifically seeking to commit "suicide by court" as Marc Chapman was. The Commonwealth should not be involved in assisting him. Assisted suicide is illegal.

Under English common law, and the law of the early American colonies, suicide itself was a felony that resulted in the forfeiture of one's property to the crown. Washington v. Glucksberg, 521 U.S 702, 711 (1997). Although no state now punishes suicide or attempted suicide, "[i]n almost every State – indeed in almost every western democracy– it is a crime to assist a suicide." Id. at 710. Moreover, the Supreme Court has recently reviewed the constitutionality of criminal prohibitions of assisted suicide, and in Glucksberg, squarely held "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." Id. at 716; See also Sampson v. Alaska, 31 P.3d 88 (Ak. 2001) (no state constitutional right to physician assisted suicide). All of the Supreme Court justices, and even the litigants for the

plaintiffs, agreed the only right that might be recognized was for the terminally ill to enlist assistance with committing suicide. Id. at 912.

In the Commonwealth, any right to die does not extend to "euthanasia, mercy killing, suicide or assisted suicide." Woods v. Commonwealth, 142 S.W.3d 24, 31, n.9 (Ky. 2004)(citing Vacco v. Quill, 521 U.S. 793, 807-09 (1997); Washington v. Glucksberg, 521 U.S. at 735. It is significant the Commonwealth prohibits both euthanasia, commonly known as "[t]he act or practice of ending the life of an individual suffering from a terminal illness or an incurable condition," and the assisted suicide of a physically healthy person who simply wants to be killed. American Heritage Dictionary of the English Language (4th Ed 2000). Both are equally illegal. Indeed, KRS 503.100 allows "[t]he use of physical force...upon another person" when it is believed force is necessary to prevent the other person from committing suicide or seriously injuring himself.

There is a strong policy in the Commonwealth against assisting someone to kill himself in whatever context. Using the judicial system for this end should be no different. "The system of criminal justice should not be available as an instrument of self-destruction." Faretta v. California, 422 U.S. 806, 836-839 (1975)(Burger, C.J., Blackmun, J., Rehnquist, J., dissenting).

Other parts of the criminal justice system do not accommodate a defendant's wish to commit suicide. Prisons, including Kentucky's, ensure a death sentenced inmate does not avoid execution by taking his own life. Once an execution date is issued, the inmate is moved to a special cell and placed under twenty-four hour surveillance. A guard is posted outside the cell to prevent the inmate from committing suicide. Robert J. Lifton & Greg

Mitchell, *Who Owns Death? Capital Punishment, The American Conscience and the End of Executions*, 82 (2000). If a death row inmate does attempt suicide, even if his execution is imminent, the state will inevitably make every effort to save the inmate's life and restore his health so the person can be executed. Id. at 98.

C. Even if the Terminally Ill Might Have a Right to Assisted Suicide the Mentally Ill Do Not.

Marc Chapman was not and is not terminally ill. But Chapman does fit the profile of a person who typically commits suicide. Those who commit suicide in the United States are overwhelmingly white and male. As a general matter, men are four times more likely to commit suicide than women. Centers for Disease Control and Prevention, "Suicide: Fact Sheet," http://www.cdc.gov/ncipc/factsheets/suifacts.htm. Chapman is a white male.

According to the National Institute of Mental Health, over ninety percent of suicide victims suffer from a diagnosable mental disorder, most commonly a depressive disorder or a substance abuse disorder. National Institute of Mental Health, "In Harm's Way: Suicide in America," http://www.nimh.nih.gov/publicat/harmaway.cfm. Chapman suffers from both. Substance abuse is found in 25 to 55 percent of suicides, though two-thirds of suicide victims who were substance abusers also suffered from a major depressive episode. George E. Murphy, "Psychiatric Aspects of Suicidal Behavior: Substance Abuse," *The International Handbook of Suicide and Attempted Suicide*, 135 (Keith Hawton & Kees van Heeringen eds., 2000).

There is also a high prevalence of Bi-polar Disorder, Post-traumatic Stress Disorder and other personality disorders. Kent R. Jamison, "Suicide and Bipolar Disorder," J. Clinical Psychology, 61 (2000); Matthew K. Nock & Peter M. Marzuk,

"Suicide & Violence," *The International Handbook of Suicide and Attempted Suicide*, at 438-39. Chapman suffers from Post-traumatic Stress Disorder and Borderline Personality Disorder.

Alterations in neurotransmitters such as serotonin are associated with an increased risk of suicide. "In Harm's Way: Suicide in America," supra. Chapman was prescribed Zoloft, a serotonin reuptake inhibitor, in an unsuccessful attempt to treat his depression just before he pled to commit "suicide by court."

D. The Commonwealth's Interests Trump Chapman's Desire to Commit State-Assisted Suicide.

"Because every execution is in some sense a public spectacle, society has a special interest in making sure death sentences are imposed only in accordance with the rule of law." Welsh S. White, "Defendants Who Elect Execution," 48 U. Pitt. Law Rev. 853, 865 (1987); See also Richard C. Dieter, "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 Geo J. Legal Ethics, 799, 818 (1990). "[T]he governmental interest in ensuring that the death penalty is administered in a constitutional manner should virtually always take precedence over the inmate's 'right to die.'" Richard G. Strafer, "Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention," 74 J. Crim. L. & Criminology, 860, 896 (1983). The state's interest in imposing the death sentence "transcends the desires of a particular inmate to commit state-assisted suicide" Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993) (Barkett J., concurring). The state has an "unqualified interest in the preservation of human life." Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 282 (1990). "To give paramount weight to [a defendant's] desires would, in effect, mean that the State is

participating in... suicide" State v Dodd, 838 P.2d 86, 101(Wash. 1992)(Utter, J., dissenting).

In People v. Kinkead, 168 Ill.2d 394, 416 (1995), the court said a "[d]efendant's request for the death penalty might be viewed as a plea for State-assisted suicide, and we do not believe...courts and juries should be put in the position of granting such requests as a matter of a defendant's preference." (The court remanded the case for a competency hearing taking into account the defendant's history of suicide, self-mutilation, psychiatric treatment and the anti-psychotic medicine he was taking at the time of his plea. See Arguments 1, 5). Likewise, the Pennsylvania Supreme Court refused to allow the execution of a defendant who sought to be killed noting his right to wave certain rights "was never intended as a means for allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state assisted suicide." Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978).

Indeed, allowing a defendant to choose to involve the state in his suicide has implications under the Eighth Amendment to the United States Constitution. The state's involvement in fulfilling a death wish renders the execution a cruel and unusual punishment. "The integrity of the criminal justice system is...jeopardized if 8th amendment protections can be waived without principled limitations. The language and history of the amendment support such an interpretation. There is no alternative right to choose one's own punishment stated in the amendment." Linda E. Carter, "Maintaining Systemic Integrity in Capital Cases: The Use of Court-appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death," 55 Tenn. L. Rev 95, 110 (1988).

In Gilmore v. Utah, 429 U.S. 1012, 1019 (1977), a case in which the Court upheld a defendant's decision to acquiesce in his execution, Justice Thurgood Marshall, in a dissenting opinion, said, "[T]he Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but...also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments." Justice Marshall reiterated his view in Lehnard v Wolff, 444 U.S. 807, 811 (1979). "Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver." He went on to object that "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death." Id. at 815. See also Jeffrey L. Kirchmeier, "Let's Make a Deal: Waiving the Eighth Amendment by Selecting A Cruel and Unusual Punishment," 32 Conn. L. Rev. 615, 617 (2000) (A defendant's "choice" to die should not waive the Eighth Amendment because the constitutional provision "preserves the right of society not to have barbarous punishments used on its behalf"); Franz v. Lockhart, 700 F. Supp. 1005, 1018-21 (E.D. Ark. 1988). Justice Marshall's view in Gilmore was "the procedure [approved by the Court] amounts to nothing less than state-administered suicide." Id.; See also Hammett v. Texas, 448 U.S. 725, 732 (1990) (Marshall J., dissenting) ("The defendant has no right to 'state-administered suicide'"); Whitmore v. Arkansas, 495 U.S. 149, 172-73 (1990)(Marshall, J., dissenting).

E. Facilitating "Suicide By Court" May Encourage Murder.

"[T]here are higher values at stake here than a defendant's right to self-determination." State v. Hightower, 518 A.2d 482, 484 (N.J. Super. Ct. App. Div. 1986).

One of those interests, beyond the illegality of assisted suicide, is ensuring the death penalty is not an incentive for a person incapable of killing himself to kill someone else in an aggravated manner to enlist the state's assistance in his suicide. In United States v. Hammer, 239 F.3d 302, 304 (3rd Cir. 2001), a dissenting justice concluded that if courts allow capital defendants to waive their right to appeal, the courts must develop a standard that will better assure the request for a waiver is "sound, certain, and appropriate." A defendant, the justice noted, who kills someone for the purpose of obtaining a death sentence "plainly enlists the Court in his suicide" by doing so. Id. Bernard Diamond, "Murder and the Death Penalty: A Case Report," *Capital Punishment in the United States,* 445-446 (H. Bedeau & C. Pierce eds., 1976).

In one case a defendant who murdered a hitchhiker testified at his trial he committed the murder in order to be executed. Despite his request for a death sentence, he was sentenced to life imprisonment. He then killed his cell-mate. He again asked for the death penalty, this time successfully. L. J. West, "Psychiatric Reflections on the Death Penalty," *Capital Punishment in the United States*, at 426-27; Katherine van Wormer, et al., "The Psychology of Suicide-Murder and the Death Penalty," 1999 J. CRIM. JUST. 27(4) (discussing a number of cases where it is believed the murder was committed by the defendant as a method of committing suicide, and quoting a former director of a state department of corrections as saying "I know of a number of murder victims would still be alive if the death penalty had not been in effect"). One defendant who had a long history of schizophrenia, agreed to confess to a triple murder only after the prosecutor personally assured the defendant he would seek the death penalty. Long v. State, 823 S.W.2d 259 (T x. Crim. App. 1992).

F. The Trial Court was not Bound by Any "Bargain" or Waiver to Accede to Chapman's Desire to Die.

The trial judge was not bound by Chapman's demand that his death wish be fulfilled as the judge believed. "[P]enalties or punishments ... are not within the discretion or control of the parties accused." People v. Cancemi, 18 N.Y. 128, 137 (1958). Chapman could not pick his own sentence, and surely not a sentence of death. The fact a "bargain" was struck by Chapman with the prosecutor did not require this. Indeed, there was not a bargain at all, particularly in a contractual sense. The "bargain" here was not a typical one made by the state in exchange for a plea. Here there was no exchange of a recommendation of a lower degree of offense or a lesser sentence as consideration for the plea. The prosecutor said it was giving up jury sentencing as its consideration, but how can that be consideration when, with a jury, it would be seeking exactly what Chapman wanted – death? In other words, there was not a bargain, just a facilitation by the prosecutor of Chapman's desire for the state to kill him.

Even if this is considered a bargain, the court was not required to honor it. "According to RCr 8.08, the court 'may refuse to accept a plea of guilty.' The discretion of the trial court exists whether the proposed guilty plea is offered with or without consideration in the form of a plea agreement." Skinner v. Commonwealth, 864 S.W.2d 290, 294 (Ky.1993). The trial court has ultimate sentencing authority, and is not bound by either the plea negotiations of the Commonwealth or the plea bargain itself. Kennedy v. Commonwealth, 962 S.W.2d 880 (Ky. App. 1997). "There is no requirement, constitutional or otherwise, that a court accept a guilty plea." Cobb v. Commonwealth, 821 S.W.2d 817, 818 (Ky.App.1992).

Recently, this Court addressed this principle in Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). Upheld was the rejection of a plea bargain because the sentence to be imposed based on the bargain was too lenient. This Court stated "excessive leniency undermines the sound administration of justice and is a proper factor for a trial judge to consider when evaluating a plea agreement." Id. at 25. But this Court also recognized a sentence for which a bargain has been struck may also be "too harsh or not in the interest of the public" and can be rejected as well, citing United States v. Skidmore, 998 F.2d 372, 376 (6th Cir.1993) ("[A] district court [may] reject a plea agreement either because the proposed agreement is too lenient or because it is too harsh."); United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir.1985) ("While '[t]he procedures of Rule 11 are largely for the protection of criminal defendants ... Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.' ")(quoting United States v. Miller, 722 F.2d 562, 563 (9th Cir.1983). This is "exactly the discretionary role that RCr 8.08 contemplates for trial courts." Hoskins v. Maricle, at 25.

When a prosecutor makes an agreement with a defendant for a plea, it is only a recommendation to the court and is not binding. Couch v. Commonwealth, 528 S.W.2d 712 (Ky. 1975). The court is free to accept the plea or reject it. It is also free to impose a sentence other than the one recommended. Id. And it is the **prosecutor** who makes the recommendation, not the defendant. See Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992). "No defendant has a constitutional right to plea bargain. The prosecutor may engage in it or not in his sole discretion." Commonwealth v. Reyes, 764 S.W.2d 62, 64 (Ky. 1989). Here Chapman's judge believed he was bound by what Marc Chapman

wanted, not only to accept the plea of guilt, but also the plea for death, simply because he concluded Chapman was competent to waive his right to counsel and a trial by jury. The judge should have rejected the plea, if not to guilt then at least for death.

G. Chapman's State-Assisted Suicide Cannot Be Allowed to Occur.

Death was the harshest penalty possible. It was the result of Chapman's demand to die. It was based on a bargain that was no bargain at all. The court gave Chapman what he demanded – "suicide by court." The granting of Chapman's death wish can only be against the interest of the Commonwealth because in this case it is an assisted suicide. This Court must stop the Commonwealth's participation and vacate Chapman's death sentence. A constitutional violation has occurred. 5th, 6th, 8th, 14th Amendments, United States Constitution; §§ 2, 7, 11, 17, Kentucky Constitution.

7. THE TRIAL COURT ERRED TO MR. CHAPMAN'S SUBSTANTIAL PREJUDICE AND DENIED HIM DUE PROCESS OF LAW WHEN IT REQUIRED HIS ATTORNEYS, WHO WERE LABORING UNDER A CONFLICT OF INTEREST, TO SERVE AS STAND-BY COUNSEL.

This issue is preserved by Mr. Chapman's and his trial attorneys' objections to being ordered to serve as stand-by counsel. Tape 11, 12/7/04, 4:00:03, 4:01:40.

After finding Mr. Chapman was competent to fire his attorneys, waive his right to a jury trial, and enter a plea of guilty to death, Id., 3:40:57-43:06, the trial court, upon the Commonwealth's request, Id., 3:40:39, indicated it was considering ordering defense counsel to remain as stand-by counsel for Mr. Chapman. Counsel asked Mr. Chapman if he had any "reason to believe that [his] actions today will affect [his] ability to communicate with Mr. Delaney or Mr. Gibson?" Id., 3:44:00. Mr. Chapman stated he

was not sure, and asked to have a moment to speak with Mr. Delaney and Mr. Gibson. Id., 3:44:30.

After going back on the record, Mr. Chapman stated:

> I don't want them as my attorneys. I'd rather you just uh...appoint me somebody else. I'd rather not have anybody. I'm not going to contest anything from here on out, just represent myself hopefully I think the only thing left should be actually done is me enter the plead of guilty, you sentence me to death. I feel that should be the only thing left that should be done in my case whatsoever. Id., 4:00:03.

The trial court told Mr. Chapman it was going to appoint stand-by counsel anyway and stated,

> I think that Mr. Delaney and Mr. Gibson will be the appropriate people to do that because they have been throughout this proceeding with you and they have been living with this case a couple of years and they are certainly the proper people to that in my opinion and the court's opinion. If you choose not to ask them any questions that's certainly your right. Id., 4:00:37.

Both Mr. Gibson and Mr. Delaney objected to the trial court appointing them as stand-by counsel. Id., 4:01:40 The trial court overruled their objection, and stated it was ordering them to continue on the case as stand-by counsel. Id., 4:02:27.

Final sentencing occurred on December 14, 2004. The trial court noted for the record that stand-by counsel had tendered to the court a "motion for court to consider attached sealed document in sentencing deliberations." Tape 12, 12/14/04, 3:31:15 The sealed document was a psychological evaluation of Mr. Chapman by Dr. Ed Connor. The court stated it had reviewed the document but

> "only considered it as to evidence of Mr. Chapman's competency and his ability to proceed knowingly, intelligently and voluntarily in representing himself and make his choices, in reviewing the document has not changed my mind. I will also tell the Supreme Court that I have not considered it as evidence of mitigating circumstances as that is contrary to the wishes of Mr. Chapman." Id., 3:31:33

A. Stand-by counsel appointed by the trial court—over Mr. Chapman's wishes—labored under a conflict of interest, and they could not act as advocates on his behalf. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent." Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948)(citations omitted) Mr. Gibson and Mr. Delaney were no longer devoted solely to Mr. Chapman's interest as his interest was committing suicide through the state. Indeed, they frankly admitted this to the trial court when they informed the judge they should not be appointed as stand-by counsel for Mr. Chapman for that reason alone. Mr. Chapman also recognized this and that is why he requested that the trial court appoint him another lawyer, if the court was going to force an attorney on him.

Because of their internal conflict, Mr. Gibson and Mr. Delaney simply could not represent Mr. Chapman, even in the limited role of stand-by counsel. Mr. Chapman needed stand-by counsel appointed to assist him not only in proceedings after his guilty plea had been accepted but at a point prior to the Court accepting his guilty plea to death. He needed counsel who could explain to him exactly what was would happen if he did enter a guilty plea, not counsel that was attempting to dissuade him from entering said plea.

Mr. Chapman stated he would prefer not to have stand-by counsel appointed at all, but that if the trial court was going to appoint counsel anyway, he wanted other attorneys. Mr. Chapman made it clear there was "good cause" for the appointment of substitute counsel. He described a "complete breakdown of communications between counsel and defendant." A conflict of interest had developed as counsel felt it was morally and ethically wrong to assist Mr. Chapman with his suicide wish. Finally, it could be said that "legitimate interests" of Mr. Chapman—if one considers his desire for death to be legitimate—were being prejudiced. Baker v. Commonwealth, 574 S.W.2d 325, 326-27 (Ky.App.1978) "Good cause" clearly existed so as to require the trial court to appoint substitute counsel who had no conflicting interests as his original attorneys did.

While it is certainly true an attorney must act as a competent, diligent, and zealous advocate for the interests of his client, Kentucky Supreme Court Rules 1.1, 1.2, and 1.3, these duties "also suggest that [he] must take reasonable steps to avoid engaging in conduct adverse to [his] own client's interests." American Bar Association Committee on Ethics and Professional Responsibility, Formal Op. 98-411 (1998). Furthermore, if one views Mr. Chapman's death wish as a form of state-assisted suicide, an attorney providing assistance to Mr. Chapman could be considered to be aiding unlawful activity.

The Comments to ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.5 provide that it "is ineffective assistance of counsel to simply acquiesce to [wishes of a "volunteer"] which usually reflect overwhelming feelings of guilt or despair rather than a rational decision. . . Counsel should try to obtain treatment for the client's mental and/or emotional problems, which

may become worse over time." Counsel for Mr. Chapman, who had acted in that capacity since his arraignment, were bound by the ABA guidelines in representing Mr. Chapman. The trial court either should not have appointed stand-by counsel at all, as Mr. Chapman requested, or the trial court should have appointed substitute counsel whom had not yet developed an attorney-client relationship with Mr. Chapman. In other words, substitute counsel who would provide impartial advice about how Mr. Chapman could further his interests should have been appointed.

Substitute Counsel representing Mr. Chapman expressed interests would not have proffered the mitigation report appointed stand-by counsel did. Until removed by the court, Mr. Gibson and Mr. Delaney, under ABA guidelines, were bound to press on in their representation of Mr. Chapman and proceed as if he might change his mind about pleading guilty to death - but that was not what Mr. Chapman wanted. See Ross Eisenberg, "The Lawyer's Role When the Defendant Seeks Death", 14 Cap.Def.J. 55, 74-76 (Fall 2001) Stand-by counsel were forced to act as both substitute counsel and as independent *amicus* counsel when ethically they could not fill either role.

B. Marc Chapman invoked his right to self-representation. The right to counsel is protected by the 6th and 14th Amendments to the US Constitution as well as § 11 of the KY Constitution. Gideon v. Wainwright, 372 U.S. 335 (1963); Jenkins v. Commonwealth, 491 S.W.2d 636, 638 (Ky. 1973) Concomitant with the right to counsel is the right to waive assistance of counsel and represent oneself at trial. Faretta v. California, 422 U.S. 806, 807 (1975); Wake v. Barker, 514 S.W.2d 692, 697 (Ky.1974). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Faretta, 422 U.S. at 819-820. A violation of any kind

of a defendant's right to self-representation is a structural error, and thus not subject to harmless error analysis. Hill v. Commonwealth, 125 S.W.3d 221, 228 (Ky.2004). "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

The more broadly worded Kentucky Constitution explicitly guarantees a criminal defendant the right to be heard "by himself and counsel." § 11, Ky. Constitution. In Kentucky, a defendant has the right to make a limited waiver of counsel, "specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services." Wake v. Barker, supra, 696. Recently in Hill, supra, 225, the Kentucky Supreme Court reaffirmed Wake, noting hybrid representation is a right in the Commonwealth "because the Kentucky Constitution explicitly guarantees a criminal defendant the right to be heard 'by himself and counsel,' Ky. Const. § 11." A trial court, confronted with a defendant's request to serve as co-counsel, is "constitutionally required" to grant said request. Id., 226.

While Mr. Chapman argues in this brief that Faretta does not apply after conviction, See Issue 3, this Court may disagree. If so, there is a Hill problem. Mr. Chapman's request to the trial court was that his attorneys be discharged and that he be allowed to enter a plea "to death." He never invoked a limited waiver of counsel or indicated that he desired stand-by counsel. That is what *the Commonwealth* wanted, not Mr. Chapman. Clearly neither the U.S. nor Ky. Constitutions allow the Commonwealth to insist upon stand-by counsel for a criminal defendant.

The trial court's appointment of Mr. Gibson and Mr. Delaney as stand-by counsel violated relevant U.S. and Ky. Supreme Court case law, as well as the 6th and 14th Amendments to the U.S. Constitution and § 11 of the Ky. Constitution. As the Faretta Court noted, "[I]t is one thing to hold that every defendant, rich or poor, had the right to assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer that he does not want." Faretta, 422 U.S. at 833. "[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Id. at 817. While it is certainly true that in Kentucky a defendant can make a limited waiver of counsel, Wake v. Barker, supra, it is clear that in the instant case that this was *not* what Marc Chapman desired. As he stated on the record, "I don't want them as my attorneys. I'd rather you just uh...appoint me somebody else. I'd rather not have anybody. I'm not going to contest anything from here on out, just represent myself hopefully I think the only thing left should be actually done is me enter the plead of guilty, you sentence me to death. I feel that should be the only thing left that should be done in my case whatsoever." Tape 11, 12/27/04, 4:00:03.

This Court must vacate Marc Chapman's convictions and sentences and remand the case to the trial court. 5th, 6th, 8th, 14th Amendments, U.S. Const., § 2, 7, 11, 17, Ky. Constitution.

8. THE PROSECUTORS DUAL ROLE RENDERS THE RESULTANT DEATH SENTENCE ARBITRARY AND UNRELIABLE.

This issue is unpreserved, but the conflict injected arbitrariness and unreliability into the proceedings and resultant sentence and, thus, is reviewable under KRS 532.075.

At a hearing on October 13, 2004, Mr. Chapman informed the court he had some papers he wanted the judge to look over. The papers, he said, indicated he wanted to change his plea from not guilty to a plea of "guilty to death," and he wanted to fire his court-appointed attorneys, John Delaney and Jim Gibson. "Sealed Exhibit A," Tape, 10/13/04, 10:58:18. Counsel informed the court they had never seen the document before. Id., 11:01:25. Interestingly, however, the Commonwealth Attorney was apparently aware of Mr. Chapman's plan as she stated she had talked to the KCPC that morning, and Dr. Free, who had previously evaluated Mr. Chapman and found him competent to stand trial, was available to reevaluate Mr. Chapman if necessary. Id., 11:12:05. It was also obvious that the Commonwealth Attorney had advance notice as she was prepared to outline for the trial court the steps it needed to take to institute guilty plea proceedings. Id., 11:13:24-16:00.

Ultimately the Commonwealth prepared for Mr. Chapman a "motion to enter guilty plea." TR IV, 508-514; Tape 11, 12/7/04, 4:26:00.

The American Bar Association Criminal Justice Standard 3-4.1(b), "Availability for Plea Discussions," provides

> A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.

In the instant case, the trial court did not determine Mr. Chapman was competent to waive counsel and was doing so knowingly, voluntarily, and intelligently until December 7, 2004. See Tape 11, 12/7/04, 3:40:57. It was less than an hour later, at that same hearing, that the Commonwealth produced a very specialized "motion to enter a guilty

plea" it had prepared on Mr. Chapman's behalf. Obviously this document was prepared before Mr. Chapman had "properly waived counsel." Furthermore there is nothing in the record to indicate defense counsel had approved of the Commonwealth Attorney negotiating a plea deal with Mr. Chapman. Indeed this would be hard to imagine in light of defense counsel's repeated opposition to Mr. Chapman's plan.

It is a basic tenet of professional responsibility that an attorney should not have any contact with an individual whom she knows is represented by counsel. Kentucky Supreme Court Rule 4.2. The prosecutor's inside knowledge of Mr. Chapman's desire to enter a guilty plea, from as early as October, 2004, coupled with her preparation of the specialized guilty plea motion, before the trial court had allowed Mr. Chapman to waive his right to counsel and his right to a jury trial, raises the question whether this ethical rule was violated.

"The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. . . The duty of the prosecutor is to seek justice, not merely to convict." American Bar Association Criminal Justice Standard 3-1.2(b)(c), "The Function of a Prosecutor." A prosecutor "must place the rights of society in a paramount position in exercising prosecutorial discretion." National Prosecution Standards, Standard 1.3 (1991) "The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole." Carol A. Corrigan, "On Prosecutorial Ethics", 13 Hastings Const. L.Q. 537, 537 (1986).

Society as a whole has a vested interest in Marc Chapman's case. Society has an interest in disallowing an individual from using the criminal justice process to commit

suicide. Society has an interest in having death sentences meted out only after a neutral and impartial party has considered all the facts of the crime itself as well as the facts surrounding the defendant's life. The adversarial process simply cannot be tested when the state facilitates the defendant's abandonment of counsel, jury sentencing, and presentation of mitigation to achieve "suicide by court." Society further has an interest in barring a criminal defendant from choosing his own sentence. The public has not been served well by the prosecutor's eager facilitation of Mr. Chapman's death wish.

This Court must vacate Marc Chapman's convictions and sentences and remand the case to the trial court. 5th, 6th, 8th, 14th Amendments, U.S. Const., § 2, 7, 11, 17, Ky. Constitution.

9. MARC CHAPMAN WAS DENIED DUE PROCESS OF LAW BY THE USE OF AGGRAVATING CIRCUMSTANCES, THAT WERE NOT CONSIDERED BY A GRAND JURY OR ALLEGED IN THE INDICTMENT AGAINST HIM, TO ENHANCE HIS SENTENCES TO DEATH.

This issue is unpreserved.

In a Kentucky murder case, an aggravating circumstance will increase the potential statutory maximum punishment from life imprisonment, under KRS 532.030(1), to a range which also includes three additional and more severe punishments: life imprisonment without the possibility of parole until after 25 years have expired, life imprisonment without any possibility of parole at all, and death. KRS 532.025(3). The eight aggravating circumstances that have been enacted by the Kentucky General Assembly are listed in KRS 532.025(2)(a). An aggravating circumstance is the basis for

increasing the prosecutor's entitlement to a particular kind, degree, or range of punishment.

Following the indictment of Marc Chapman, the prosecutor filed a notice of intent to seek the death penalty and rely upon the aggravating circumstances of intentional multiple murders, murder during the commission of first degree rape, murder during the commission of first degree burglary, and murder during the commission of first degree robbery. TR 1 5–7. However, the Grand Jury did not return an indictment that charged that the murders were aggravated by these penalty enhancers . TR 1 1-4.

The U.S. Constitution's guarantee of due process requires that any fact, (other than the fact of a prior conviction), which increases the penalty for a crime beyond the normal statutory maximum must be charged in the indictment, presented to a jury, and proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227, 243 n. 6 (1999).

In Apprendi, the U.S. Supreme Court announced a rule, applicable to the states through the Due Process Clause of the 14th Amendment, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S., at 490. "(I)t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id.

The Apprendi ruling, (which reversed a New Jersey judgment based on a statutory scheme providing for judge-imposed enhanced punishment for "hate crimes"), was

foreshadowed by the Court's statement in the federal criminal case of Jones, supra. In Jones, it was said that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., 526 U.S. at 243, n.6. In Apprendi, this principle was reaffirmed and applied to the states through the 14th Amendment, but the case did not present any claim involving the Jones requirement of an **indictment** on punishment-enhancing facts.

If there had previously been a question as to whether the principles underlying Jones and Apprendi would apply to the matter of aggravating circumstances in death penalty cases, the question was laid to rest by the decision in Ring v. Arizona, 536 U.S. 584 (2002). In that case, Apprendi was specifically applied to the issue of whether a defendant may be sentenced to death based upon a judge finding the existence of an aggravating circumstance, rather than upon a jury finding. As the Court explained: "The dispositive question . . . 'is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent upon the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt. A defendant may not be expose(d) . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ring, 536 U.S. at 602.

The prosecution in Ring argued that, because Arizona's statutory penalty range for murder included death, Apprendi's rules about exceeding the statutory penalty range

should not apply to Ring's case. The Supreme Court, however, specifically rejected that notion.

Both Apprendi and Ring dealt with the narrow issue of judge vs. jury fact-finding, rather than also with the related issue of whether penalty-enhancing facts must be the subject of grand jury indictment. This was because neither Apprendi nor Ring challenged the omission of sentence-enhancing facts from their state court indictments. So, the issue of whether states must charge penalty enhancers in their indictments was specifically reserved by the Court in each case, (Apprendi, 530 U.S. at 466-67, n. 3; Ring, 536 U.S. at 597, n. 4), although it is clear that the 5th Amendment requires this in federal criminal prosecutions, Jones, supra; Apprendi, supra. One of the reasons this issue has been reserved thus far is that the Fifth Amendment right to "presentment or indictment of a grand jury" has not yet been incorporated among the rights that apply to the states through the 14th Amendment. See Hurtado v. California, 110 U.S. 516 (1884).

Although some states do not provide the right to have a criminal prosecution commence only through presentment or indictment by grand jury, Kentucky does. Section Twelve of the Kentucky Constitution mandates:

> No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

Kentucky's requirement of an indictment is strikingly similar to the federal indictment requirement found in the 5th Amendment to the US Constitution, which reads in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public

danger . . ." Our state due process guarantees are actually broader than the federal due process guarantee. The federal constitution provides through the 5th Amendment simply that "(n)o person shall be . . . deprived of life, liberty, or property, without due process of law", while our state constitution provides:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right of enjoying and defending their lives and liberties . . . (and) The right of . . . applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance. Kentucky Constitution, Section One.
>
> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. Kentucky Constitution, Section Two.
>
> All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment. Kentucky Constitution, Section Three.
>
> All courts shall be open, . . . and right and justice administered without sale, denial or delay. Kentucky Constitution, Section Fourteen.

Thus, the principles of federal constitutional law announced in Jones, Apprendi, and Ring apply to Kentucky constitutional law, and the rights provided in the Kentucky Constitution are at least equal to, if not greater than, those rights guaranteed in the US Constitution.

The indictment requirement in § 12 of our state constitution applies to death penalty cases. Section 12 requires an indictment for capital or "infamous" crimes, and Kentucky defines an offense punishable by execution as an "infamous crime", Commonwealth v. Reyes, 764 S.W.2d 62, 66 (Ky. 1989).

The Apprendi/Jones/Ring rule applies to Kentucky capital defendants under the state and federal constitutions. The Supreme Court, in announcing its ruling in Apprendi, explained the rule's deep roots in the common law when indictments were issued pursuant to statute:

> Just as the circumstances of the crime and the intent of the defendant at the time of the commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstance, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown 170]." If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only."

Id., 530 U.S. at 480-81. Kentucky legal principles, including the principles of due process, flow from the common law, from which the Apprendi decision came. See Norris v. Doniphan, 61 Ky. 385 (Ky. App.1863).

In Kentucky, the finding of an aggravating circumstance operates to increase the maximum possible penalty for murder from life imprisonment to death. Thus, now that the U.S. Supreme has clarified the law in Apprendi and Ring, it is clear that an aggravating circumstance must be charged in the indictment if the state wishes to use that factor to increase the potential punishment. Sentencing a state criminal defendant to an enhanced penalty without affording him the protection of an indictment on the facts necessary for the enhanced penalty is violative of the federal constitutional law explained in Apprendi and Ring.

Moreover, when the state institutes a procedure which the federal constitution does not require it to institute, (such as the right of appeal or the right of grand jury indictment), the state must nevertheless implement that procedure in accordance with federal due process requirements. "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). See also Rose v. Mitchell, 443 U.S. 545, 557, (1979)(states that institute prosecutions by means of grand jury indictment must comply with commands of the Fourteenth Amendment's equal protection clause).

Kentucky has long had a requirement that a persistent felony offender charge, which is nothing more than a sentence enhancer, must be the subject of grand jury indictment. KRS 532.080; Jackson v. Commonwealth, 20 S.W.3d 906 (Ky. 2000); Price v. Commonwealth, 666 S.W.2d 749 (Ky. 1984). The death penalty aggravator situation cannot be distinguished from the PFO situation. Indeed, this Court's official form indictments for both "capital murder" and persistent felony offender status require the inclusion of those facts which are being alleged as the bases for enhancement. Form 15, Kentucky Rules of Criminal Procedure, Appendix of Official Forms. The indictment in the current case does not comport with that form.

Even though the requirement of grand jury indictment has not been applied to the states by the U.S. Supreme Court, the State of Illinois has applied Apprendi and decided that prosecutions in that state for enhanced sentences require grand jury indictment on the enhancement facts. People v. Lucas, 746 N.E.2d 1211 (2001), *appeal denied* by People v. Lucas, 755 N.E.2d 481 (2001). The state of New Jersey has, likewise, applied Ring to

require, under that state's constitution, that aggravating circumstances must be submitted to the grand jury and must be found by the grand jury, as reflected by the indictment, in order to render the defendant eligible for the death penalty. State v. Fortin, 843 A.2d 974 (N.J. 2004).

Even long before Apprendi and Ring, there was a recognition that enhancement facts should be included in indictments. As early as 1978, when Hawaii's high court declared that grand jury indictment is necessary, that court identified no fewer than five other state jurisdictions which had already ruled that "aggravating circumstances must be charged in the indictment in order for an enhanced penalty to be imposed", State v. Apao, 586 P.2d 250, 257-258 (Hawaii 1978).

The importance of grand jury proceedings, over and above simple notice to a defendant about the charges he faces, has been recognized by the U.S. Supreme Court. Vasquez v. Hillery, 474 U.S. 254 (1986), involved a state court criminal prosecution. The Court stated: "The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense – all on the basis of the same facts." Id., 474 U.S. at 263.

This crucial role played by grand juries was noted by the United States Supreme Court more recently, too. In Campbell v. Louisiana, 523 U.S. 392 (1998), the Court cited the above passage from Vasquez v. Hillery, and added: "The grand jury, like the petit jury, acts as a vital check against the wrongful exercise of power by the State and its prosecutors."

This error deprived the trial court of jurisdiction. The Jones, Apprendi, and Ring decisions, show conclusively that statutory aggravating circumstances, (which must be alleged and found before aggravated penalties may be imposed), are functionally equivalent to factual elements of an offense. Section 12 of the Kentucky Constitution requires the prosecution to obtain an indictment. RCr 6.10(2) mandates that an indictment "shall contain, and shall be sufficient if it contains, a plain, concise, and definite statement of the essential facts constituting the specific offense with which the defendant is charged."

An indictment, such as the one in this case, that does not charge any penalty-enhancing aggravating circumstance, does not "unmistakably" charge all the necessary elements of an aggravated murder which carries aggravated penalties. See Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996); Jackson v. Commonwealth, 20 S.W.2d 906 (Ky. 2000).

> In Malone v. Commonwealth, 30 S.W.3d 180 (Ky. 2000), this Court stated:
> Jurisdiction is a court's power to decide a case. As a prerequisite for presiding over the case, a court must have jurisdiction of the subject matter of an offense and of the person of the defendant. That is, two jurisdictional requirements must be satisfied before a court has authority to hear and determine a particular cause of action . . . A criminal prosecution requires the existence of an accusation charging the commission of an offense. Such an accusation either in the form of an indictment or an information, is an essential requisite of jurisdiction. In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in cases where the individual consents."

Id. at 183.This Court recognized that "Section 12 of the Kentucky Constitution serves as a check on arbitrary government prosecution," Id. at 182.

The U.S. Supreme Court views the indictment requirement as a buffer between the individual and the power of the state. In Wood v. Georgia, 370 U.S. 375 (1962), it

stated: "Historically, this body (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Id., 370 U.S. at 390.

In order to assure that death sentences are meted out only to those few individuals for whom the ultimate penalty is appropriate, a heightened standard of reliability and care is required in death penalty cases. See e.g. Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky. 1989), and Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(because of the qualitative difference between a death sentence and any other sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). Constitutional principles require that there be a genuine narrowing of the class of people who stand trial for their lives, so that not just every murder defendant faces the death penalty. See Zant v. Stephens, 462 U.S. 862, 878 (1983).

In Kentucky, grand jurors are the only non-elected decision-makers involved in the process of defining what punishments a criminal defendant should face. For example, they are free to indict someone for reckless homicide, even though the prosecutor might think that the person should be charged with murder or manslaughter. Unlike prosecutors, grand jurors do not have to face the danger of losing a re-election bid, or of losing their jobs, if they make unpopular decisions. See Hurtado, supra, 100 U.S. at 554-555 (1884)(Harlan, J., dissenting). Grand jurors can make a more objective decision on

whether an individual should stand trial for his life. They are the ones who can truly narrow the class of people eligible for a death sentence. Also, unlike an aggravated penalty-qualified petit jury, a grand jury actually includes a cross-section of the populace and can render a uniquely unbiased decision on whether an aggravated sentence should be an option in any particular case.

Given this very specialized role of the Kentucky grand jury, (whose penalty-charging function is mandated by Section 12 of our state constitution and by the due process guarantees of the federal constitution, as shown above), grand jury indictment on penalty-enhancements is an indispensable part of protecting people in Kentucky against cruel and unusual punishments.

The 8th Amendment places upon the courts an ongoing "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society, " Gardner v. Florida, 430 U.S. 349, 357 (1977). State courts must reevaluate their death penalty sentencing schemes in light of the Supreme Court's latest evolutionary step in the standards of procedural fairness. This Court must reverse Marc Chapman's sentence of death.

10. MARC CHAPMAN'S DEATH SENTENCES ARE ARBITRARY AND DISPROPORTIONATE.

Proportionality review is mandated by KRS 532.075.

Marc Chapman's death sentences are unconstitutional considering the particular circumstances of his case and Mr. Chapman himself, as well as comparing his case with other similar cases. In Smith v. Commonwealth, 599 S.W.2d 900, 912 (Ky. 1980), this Court stated "each and every mitigating circumstance, by reason that it is mitigating, is

pitted against aggravating circumstances." It is implicit in our sentencing scheme that death will not result unless aggravation outweighs mitigation. In Marc Chapman's case, the aggravation does **not** outweigh the mitigation submitted but not considered.

There was compelling mitigation submitted by stand-by counsel but not considered by the trial court. See Sealed EX: Stand-by Counsel's Motion For Court To Consider Attached Sealed Document In Sentencing Deliberation and Report of Ed Connor. Dr. Connor understatedly described Marc Chapman as having a "very chaotic history." Id. As a pre-verbal infant, Marc developed an analeptic depression due the emotional detachment of his parents. Id. His mother was an alcoholic and his father was a pedophile. Id. There was much domestic violence involving his parents. Id. At the age of three, Marc was sexually abused by his father and began having dissociative states. Id. At the age of eight, Marc began having problems with severe drug and alcohol abuse and was molested by a babysitter. Id. He became sexually active and suicidal. Id. At the age of eleven, he learned of his father's abuse while in counseling and thereafter confused his father's criminal acts with normal homosexual feelings. Id. Marc began acting out. Id. In his teens, Marc was subjected to a violent attempted sexual assault by a group of boys while he was in juvenile prison. Id. As a young man, Marc's drug and alcohol use increased as did his sexual acting out, and the episodes of dissociation continued. Id. Dr. Connor opined that the charged offenses were committed by Marc while in a dissociative state and while under the heavy influence of drugs and alcohol. Id. Marc was suicidal and under the influence of a severe mental illness that had roots deep in his childhood. Id. There was additional significant "of record" mitigation that the trial court refused to consider. See Argument 6 where it is detailed.

Additionally, other cases with similar offenses and aggravating factors have not resulted in a death sentence. Such cases include: Reyes v. Commonwealth, 764 S.W.2d 62, 62-63 (Ky. 1989)(case described as "one of the most heinous and infamous in Christian County history;" murder, attempted murder, first degree robbery and two counts of first degree sodomy; while in custody awaiting trial, Reyes escaped – life sentence); Sommers v. Commonwealth, 843 S.W.2d 879 (Ky. 1992) (2 murders of young girls molested by the defendant - life without the possibility of parole for 25 years); Commonwealth v. Phon, 17 S.W.2d 106 (Ky. 2000) (2 execution-style murders, first degree assault, first degree robbery, first degree burglary - life without parole). Marco Chapman's death sentences cannot stand because others who "deserve" capital punishment as much, or more so than he have escaped it. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

For the state to pass over more "deserving" defendants, and strike randomly at Marc Chapman, indicates that our legal system functions more akin to the whims of a monarchy than to the logically deliberate actions of a just society. In Bush v. Gore, 531 U.S. 98 (2000), the U.S. Supreme Court found that a state's election ballot-counting scheme violated equal protection guarantees where the standard for what constituted a valid vote varied from county to county within the state, and where some counties had no set standard which they applied to all of its own ballots. The same court which decided Bush v. Gore has mandated that a state must use a rational standard in deciding who lives and who dies at the hands of the state. Kentucky has no rational standards for making such decisions and for avoiding the "arbitrary and disparate treatment" condemned by Bush v. Gore.

Just as a state may not value one person's vote over that of another, Bush v. Gore, supra at 104-105, so must a state have a means of making sure that it does not value one person's life over that of another "by . . . arbitrary and disparate treatment," Id. This is a matter of both state and federal constitutional equal protection.

Finally, in nearly 30 years and thousands of potential death penalty cases, no defendant except Marc Chapman has been permitted to demand and receive a sentence of death in a self-described "suicide by court" attempt. The arbitrariness, unreliability and disproportionality that this aspect alone injects into the case requires that the death sentences be vacated.

Marc Chapman's death sentences are arbitrary and disproportionate considering his mitigation, the circumstances of his case, and other cases in which death was not imposed for similar or worse crimes with significantly less compelling mitigation. His death sentences must be reversed. §§ 1, 2, 3, 7, 11, 17, 26, KY Constitution; 8th, 14th Amendments., US Constitution.

11. THIS COURT'S METHOD OF PROPORTIONALITY REVIEW DENIES MARC CHAPMAN DUE PROCESS, EQUAL PROTECTION, A RATIONAL SENTENCING DETERMINATION AND EFFECTIVE ASSISTANCE OF COUNSEL ON THIS APPEAL BY ITS FAILURE TO COMPARE SIMILAR CASES IN WHICH THE DEATH SENTENCE WAS NOT SOUGHT OR IMPOSED AND BY ITS FAILURE TO DIVULGE THE SPECIFIC DATA ON WHICH THIS COURT RELIES.

This issue is preserved by its inclusion in this brief. Proportionality review is part of the review mandated by KRS 532.075.

A. The Manner In Which Proportionality Review Is Conducted By This Court is Flawed

The Commonwealth of Kentucky, through its death penalty statutes, has set up a proportionality review process. See KRS 532.075(3)(c). Once such a review is established by state statute, it must be applied constitutionally to comport with due process. Greer v. Mitchell, 264 F.3d 663, 691 (6th Cir. 2001). In Evitts v. Lucey, 469 U.S. 387, 401 (1985), the Supreme Court of the United States said "when a state opts to act in a field where its actions have significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and in particular, in accord with the Due Process Clause." Accord Olim v. Wakinekona, 461 U.S. 238 (1983); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981); Hicks v. Oklahoma, 447 U.S. 343 (1980); Ford v. Wainwright, 477 U.S. 399 (1986).

Under KRS 532.075(l), "[w]henever the death penalty is imposed for a capital offense. . . .the sentence shall be reviewed on the record by the Supreme Court." "With regard to the sentence, the court shall determine. . . .[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3)(c). The problem with Kentucky's review process is that this Court does not compare cases in which the death penalty was imposed to "the penalty imposed in similar cases." This Court's universe has been limited solely to those cases in which the death penalty was imposed; not to other "similar cases" in which death was not imposed. It is also limited to only those cases which have been affirmed on appeal. Halvorsen v. Commonwealth, 730 S.W.2d 921, 928 (Ky. 1987).

The constitutional flaw in this Court's proportionality review is that despite having ready access to other cases through its own records in which the aggravating factor was multiple deaths and/or accompanying felonies, but where a death sentence was

not returned, it fails to take those particular "similar cases" into consideration in carrying out its proportionality review. As such, not only is this Court's scope unconstitutionally limited, but the entire procedure mandates a finding of proportionality. It renders the review process meaningless in violation of the Due Process Clause and the 8th Amendment. As noted in Argument 10, a comparison of Marc Chapman's case to other similar cases in which death was not imposed could lead this Court to a very different conclusion about the appropriateness of his death sentence.

Chief Justice Berger, dissenting in Furman v. Georgia, 408 U.S. 238 (1972), said, "The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed." Central to Justice White's decision that the death penalty was "patently excessive and cruel and unusual punishment" was the fact that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

North Carolina has a similar proportionality review statute. See State v. Young, 325 S.E.2d 181 (N.C. 1985). In carrying out its proportionality review, however, the North Carolina Supreme Court recognizes that it cannot examine only cases in which the death penalty was returned. Accordingly, in carrying out its review, it compares the death penalty case before it with all cases that it has reviewed on appeal containing the same factual predicate whether the death penalty was imposed or not.

Likewise, New Jersey has a proportionality review statute. In State v. Loftin, 724 A.2d 129 (N.J. 1999), the New Jersey Supreme Court articulated its analysis of the various proportionality review processes used by other courts to determine which method

it should adopt. In dismissing the process used by Kentucky, of limiting the scope of those cases reviewed only to other cases in which the death penalty was actually imposed, the court proclaimed such review "inadequate." Id. at 146. The court concluded "it was self-evident that the universe for proportionality review must, at a minimum, include all penalty-trial cases [i.e. those similar cases in which a penalty phase was conducted]." Id. at 146 (citations omitted). Ultimately the New Jersey court chose to include all death-eligible homicides (even those in which the death penalty was not sought by the prosecution) in the statistical universe of their proportionality review, stating, "[W]e determined that our mandate to prevent arbitrariness in death sentencing should extend to review of prosecutorial decisions whether to seek the death penalty." Id. at 146 (citations omitted). See also State v. Cooper, 731 A.2d 1000 (N.J. 1999) (for further analysis of methodology).

Due process demands that this Court expand its universe to all similar cases, whether death was imposed or not, so that there can be a meaningful proportionality review of Marc Chapman's death sentences. See Correll v. Commonwealth, 352 S.E.2d 352, 360-361 (Va. 1987) ("similar cases" include "all capital cases presented to this court under the current capital-murder statutes, including those in which life sentences were imposed"); Harvey v State, 682 P.2d 1384, 1385 (Nev. 1984) ("similar cases" include "all capital cases, as well as appealed murder cases in which the death penalty was sought but not imposed"). See also White v. State, 81 A.2d 201, 212-215 (Md. 1984); State v. Jeffries, 132 717 P.2d 722, 740 (Wash. 1986); State v. Neal, 796 So.2d. 649 (La. 2001).

When conducting its proportionality review in Young, supra, the North Carolina Supreme Court recognized that in twenty-six cases involving murder during the course of

a robbery, jurors returned death verdicts only three times. Accordingly, it held the sentence of death for Young was disproportionate. Yet, if this Court were reviewing the same case, it would have only compared the death sentence on review to those three cases in which the death penalty was returned and, of course, found the sentence proportionate. The Kentucky proportionality review process simply ensures that a sentence of death will **always** be found proportionate as long as there has been one other death penalty appeal with an identical aggravating factor. This is clearly not "in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, supra.

Finally, "[i]n order to ensure that a death sentence has not been arbitrarily or capriciously imposed, the states must provide 'meaningful appellate review.'" Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Parker v. Dugger, 498 U.S. 308, 321 (1991). ("[M]eaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime.'" (citation omitted) (original emphasis)). Kentucky's proportionality review, which is an integral part the appellate review of a death sentence does not perform this function, although the statute requires this Court to evaluate "similar cases, considering **both the crime and defendant.**" KRS 532.075(3)(c) (emphasis added). This Court compares and analyzes only the nature of the crimes and aggravators involved.

Despite the mandates of KRS 532.075, in none of the published opinions of this Court in death penalty cases has there been any discussion of the defendant's background and character as having a bearing on the proportionality of the sentence of death. That

this is a part of the proportionality review has been noted, but no analysis has been provided. See, e.g., Woodall v. Commonwealth, 63 S.W.3d 104, 133 (Ky. 2001) By way of contrast, Florida, which has judge sentencing based on a jury recommendation, requires the trial court to specify the mitigating as well as the aggravating circumstances that were found to be present in the case, and the Florida Supreme Court has relied upon these findings to reverse numerous death sentences on proportionality grounds.[8] The failure to consider the "nature of the defendant" as well as the circumstances of the crime for proportionality review does not comport with the "fundamental respect for humanity underlying the Eighth Amendment." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

B. Inability To Obtain Access To KRS 532.075(6) Data.

In order to strengthen his argument that Kentucky's death penalty is disproportionately applied, Marc Chapman needs access to the KRS 532.075(6) data compiled by this Court regarding the application of capital punishment throughout the state. Formally and informally, this Court has rejected arguments to obtain this data. Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978); Gall v. Commonwealth, 607 S.W.2d 97, 113 (Ky. 1980); Harper v. Commonwealth, 694 S.W.2d 665 (Ky. 1985). "[T]he public defender is not entitled to such data." Skaggs v. Commonwealth, 694 S.W.2d 672, 682 (Ky. 1985). This Court's refusal to release the KRS 532.075(6) data, prevents Marc Chapman from fully presenting an argument that Kentucky's death penalty scheme is

[8] See, e.g., State v. Fitzpatrick, 527 So.2d 809 (Fla. 1988); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990); Hegwood v. State, 575 So.2d 170 (Fla. 1990); Downs v. State, 574 So.2d 1095 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Copeland v. Dugger, 565 So.2d 1384 (Fla. 1990); Cheshire v. State, 568 So2d 908 (Fla. 1990); Lucas v. State, 568 So.2d 18 (Fla. 1990); McKinney v. State, 579 So.2d 80 (Fla. 1991).

unconstitutional as applied under Furman v. Georgia, supra, and, more directly, prevents him from effectively arguing that his sentence is disproportionate.

Perhaps, since this Court's universe of affirmed death sentences is so limited, he could discern the statutory aggravating circumstances of those cases by reading the opinions. But there is no possible way, simply from this Court's opinions, that Marc Chapman can determine how all of the facts concerning the nature of his offense compare with all of the facts in others. Likewise, it is impossible to discern all of the mitigation from those other cases to compare it to his background and character. This is exacerbated by the fact that both aggravating and mitigating circumstances are not limited to just those delineated by KRS 532.025, but are myriad. Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994); Lockett v. Ohio, 438 U.S. 586 (1978). Indeed, it is impossible for Marc Chapman to know what aspects of the nature of the offenses and background and character of the defendants are used for comparison by this Court even if he could determine all of the facts and circumstances of every death penalty case appealed and affirmed. He is virtually in the dark.

Access to the data is imperative because decisions about the appropriateness of Marc Chapman's death sentences will be made without disclosure of vital information and without the participation of counsel or argument of any kind. This offends the 6th, 8th and 14th Amendments to the US Constitution. See Gardner v. Florida, 430 U.S. 349, 360 (1977). See also Harris by and through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1286-91 (W.D.Wash. 1994). Indeed, KRS 532.075(4), states that a defendant sentenced to death "shall have the right to submit briefs...and to present oral argument to the court." That statute also requires this Court to reference similar cases and gives this Court the

authority to set aside and remand the case for resentencing "based on the record and argument of counsel" with regard to disproportionality. KRS 532.075(5)(b).

Marc Chapman is indigent and is unable to collect complete records of all previous actual or potential death penalty cases on his own. Therefore, he also has been denied equal protection of the law. See Griffin v. Illinois, 351 U.S. 12 (1956).

C. Conclusion.

Marc Chapman's rights are violated by the lack of procedural due process in this Court's proportionality review. He is denied due process, equal protection and the effective assistance of counsel. 5th, 6th, 8th and 14th Amendments, US Constitution; §§ 1, 2, 7, 11, 17, KY Constitution. This absence of a meaningful disproportionality review is particularly devastating in a case such as this where Marc Chapman and the prosecutor bargained for a plea in exchange for a sentence of death to satisfy the victims' desires for revenge and Mr. Chapman's desire for "suicide by court." A system that, at a minimum, permits, and perhaps encourages, this with no sound procedure in place to review the propriety and proportionality of such a result cannot stand.

12. THE DEATH PENALTY IS UNCONSTITUTIONAL

This issue is unpreserved, However, KRS 532.075 mandates that this Court review imposed death sentences to determine whether they are, inter alia, arbitrary, disproportionate or invalid.

A. KRS 532.025 Is Unconstitutional Because It Does Not Narrow The Class Of Persons Eligible For The Death Penalty.

The 8th Amendment requires that a state's scheme properly establish a threshold below which the death penalty cannot be imposed. That procedural structure must include

rational criteria with which to narrow the decision-maker's judgment as to whether a particular defendant meets that threshold. If the criteria are applicable to each and every murder defendant, then the statutory scheme and the criteria are unconstitutional. Tuilaepa v. California, 512 U.S. 967 (1994) (aggravating circumstances must meet requirements not applicable to every defendant convicted of murder and may not be unconstitutionally vague); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Zant v. Stephens, 462 U.S. 862 (1983); Shell v. Mississippi, 498 U.S. 1 (1990); Walton v. Arizona, 497 U.S. 639 (1990); and Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994).

This Court's interpretation of KRS 532.025(2) and (3) in Jacobs v. Commonwealth [9], supra, renders the Kentucky procedural and statutory death penalty scheme unconstitutional.

KRS 532.010(1) provides that capital offenses are specific types of felonies and have a specific sentencing statute, KRS 532.030(1). Jacobs, at 420. KRS 532.030(1) provides that any person convicted of a capital offense may have his punishment fixed at death, imprisonment for life without benefit of probation or parole for 25 years, life without benefit of probation or parole, life in prison or imprisonment for not less than 20 years. Murder is defined as a "**capital offense**," not a **Class A felony**; therefore, the death penalty or LWOP or LWOP 25 are applicable sentences. KRS 507.020.

Previously, KRS 532.020 did not mean that **all** murders, which by statute are capital offenses, were death eligible. Statutory aggravating circumstances were presumed

[9] This Court's opinion in Jacobs was written before the General Assembly amended KRS 532.030 to include life without parole and KRS 532.025, to include a "domestic violence" aggravator. Even with these amendments, the same logic applies.

to have to exist and be found beyond a reasonable doubt before the death penalty, LWOP or LWOP 25 could be imposed. The final sentence of KRS 532.025(3) reads as follows:

> 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 of life without benefit of probation or parole until the defendant has served a minimum of 25 years of his sentence, shall not be imposed.

Jacobs, however, following this Court's decision in Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990), changed the landscape. In Harris, the appellant argued that he could not be sentenced to life without parole for 25 years because the jury had not found one of the "aggravating circumstances enumerated in KRS 532.025(2)(a)." This Court found that Harris had "overlook[ed] the introductory language of that subsection," which authorized judge and jury to "consider 'any aggravating circumstance otherwise authorized by law." Harris, at 805.

In Jacobs, this Court held the last sentence of KRS 532.025(3) to have been "inartfully drafted" and having made this observation, negated it completely, stating: "[t]herefore, the jury's consideration of aggravating circumstances was not limited to one exactingly and specifically enumerated in this statute." Jacobs, at 420. This Court could only have meant that both judge and jury were authorized to consider non-statutory aggravating circumstances as well. Non-statutory aggravators are not "enumerated" in the statute and are "otherwise authorized by law."

This Court pointed out that a specific sentencing statute, KRS 532.030(1) governs capital offenses. That statute provides:

> [w]hen a person is convicted of a capital offense, punishment may be fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit

> of probation or parole until he has served a minimum of twenty-five (25) years of his sentence. . . . . KRS 532.030(1); Jacobs, at 420.

In the absence of the final sentence of KRS 532.025(3), combined with the continued applicability of KRS 532.030, the question "Are all murder defendants 'death eligible' under Kentucky's statutory sentencing scheme post-Jacobs?" must be answered in the affirmative. The only circumstance making a person death eligible in the Commonwealth of Kentucky is his conviction for murder. This is contrary to Tuilaepa, supra. See also Arave v. Creech, 507 U.S. 463, 474 (1993) (if sentencer can "fairly conclude that [aggravators] apply to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.")

The final sentence of KRS 532.025(3) formerly would have limited the criteria for death eligibility to those aggravating circumstances set out in KRS 532.025(2). However, with the elimination of that subsection in Jacobs and the continued applicability of KRS 532.030, **every** defendant charged with a capital offense is "death eligible" even if **only** non-statutory aggravation—a factor not "enumerated in KRS 532.025(2)—is present in the case. This runs afoul of the 8th and 14th Amendments and the prohibition against mandatory death sentences. See Woodson v. North Carolina, 428 U.S. 280 (1976).

This Court should remand Marc Chapman's case for a new trial at which the death sentence is not an option.

B. There Is Insufficient Statutory Guidance For Imposition Of The Death Penalty.

An indispensable, constitutionally mandated aspect of any procedure allowing for the intentional taking of a life by the state is that the sentencer must be given meaningful guidance in determining when to impose the ultimate punishment. The sentencer must

consider the character and record of the individual offender and the circumstances of the particular offense before imposing death as punishment. It is only through legislative guidance that there can be an avoidance of "a substantial risk that [the death penalty] would be imposed in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976)

Because "death is a different kind of punishment from any other which may be imposed in the country," Gardner v. Florida, 430 U.S. 349, 357 (1977), the U.S. Supreme Court has mandated that statutory schemes set up for the sole purpose of allowing the state to take life must provide for "a greater degree of reliability" in assessing death as punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

To ensure this "greater degree of reliability," the Supreme Court has gone to great pains to insist that the states which desire to impose the death penalty implement "procedures that safeguard against the arbitrary and capricious imposition of death sentences." Roberts v. Louisiana, 428 U.S. 325, 334 (1976).

The statutory scheme pursuant to which Marc Chapman was sentenced to death provides no standards to guide the sentencer "in its inevitable exercise of power to determine which murders [sic] shall live and which shall die." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

There are numerous problems with Kentucky's statute. Kentucky's death penalty statute does not require the indictment to charge a capital crime by charging the aggravators. See Argument 9. It permits conviction and execution of the factually and legally innocent. It does not provide directions to the court and/or jury on how it should hear and resolve "additional evidence in extenuation, mitigation and aggravation of

punishment." There are no directions providing which evidentiary standard shall be used in determining when mitigating factors exist. There is no guidance on how to weigh the mitigating factors against the aggravating circumstances. For that matter, there is no requirement that mitigators and aggravators even be weighed against each other. There is absolutely no requirement that the judge or jury be required to make a finding regarding the existence of any mitigating factors.

Additionally, the statute may allow the prosecution to introduce, during the guilt or penalty phase, non-statutory factors which aggravate the sentence. The statute may limit consideration of the defendant's character and background to those mitigating circumstances specifically enumerated. The following mitigating circumstances are unconstitutionally vague: KRS 532.025(2)(b)(1) (What is a "significant history of prior criminal activity"?). KRS 532.025(b)(8)(What constitutes "youth"?)

Aggravating circumstances are vague as well, including KRS 532.025 (2) (a) (1), "The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has substantial history of serious assaultive criminal convictions." Some prosecutors have relied upon the aggravating circumstance in KRS 532.025(2)(a)(2), ("The offense of murder . . . was committed while the offender was engaged in the commission of arson in the first degree"), in fact situations where the state alleges that the defendant started a fire for the purpose of obliterating evidence, after the victim was already dead, and where there is no allegation that the person died during an arson fire.

Additionally, KRS 532.025(2)(a)(3), is unconstitutionally vague and overbroad. Because of this vagueness and overbreadth, one particular prosecutor actually gave notice

of intent to seek death on grounds that a simple handgun, alleged to have been used during a drug deal shooting, was 'a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one (1) person'. Other prosecutors certainly would not take that position, and that means that the statute is vague. And, such an application is certainly not the requisite narrowing of the class of persons eligible for the death penalty, since such application would mean that every single murder with a handgun would be a death case.

If KRS 532.025(2)(a)(7), the "police officer aggravator", were to be construed to allow a death sentence against someone who did not know that the victim was a public official or a law enforcement officer, then that statute, too, would be vague and overbroad. The circuit court in another case ruled just that way." Similarly, if KRS 532.025(2)(a)(8) were to be construed to allow a death sentence against someone who was not aware that an EPO or DVO was in effect, then it, too, would be unconstitutionally overbroad. Finally, the Kentucky statute authorizes a death sentence without a finding of specific intent to kill.

The fact that such crucial and outcome-determinative questions remain unanswered under the death penalty provisions of KRS 532.025 establishes that the scheme does not provide the proper guidance to determine [who] shall die. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). As such, any penalty of death imposed under such an infirm scheme cannot be carried out under the 5th, 6th, 8th and 14th Amendments to the US Constitution and §§2, 7, 11 and 17 of the KY Constitution. Marc Chapman must be given a new penalty phase which will not include death as a possible punishment.

C. The Death Penalty As Applied In Kentucky Is Discriminatory.

In Furman v. Georgia, 408 U.S. 238, 310 (1972), the U.S. Supreme Court held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." The weakness in capital sentencing procedures exposed in Furman was that the death penalty was "wantonly" and "freakishly" imposed. The arbitrariness and discrimination which the Court found and opposed in Furman continues to exist in Kentucky, notwithstanding nearly 30 years of supposed "guided discretion."

The Supreme Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), does not foreclose this claim that the death penalty in Kentucky is arbitrarily applied, in view of Kentucky's required statutory review. Furman's holding that the death penalty may not be wantonly or freakishly applied remains valid.

Nothing could be more offensive to constitutional principles than for a citizen to be selected for death because of his own race or because of the race of the victim. Yet, race is a predictor of the outcome in Kentucky death penalty cases. Studies by social scientists, proving that this has been the Kentucky experience, were scrutinized by the United States General Accounting Office (GAO), as to their methodology and then were approved by the GAO for inclusion in a 1990 Report to the Senate and House Committees on the Judiciary on the issue of whether race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death. The research on Kentucky's experience with the death penalty found that, between December 22, 1976, and December 31, 1991:

> Blacks accused of killing Whites had a higher than average probability of being charged with a capital crime (by the prosecutor) and sentenced to

> die (by the jury) than other homicide offenders. This finding remains after taking into account the effects of differences in the heinousness of the murder, prior criminal record, the offender, and the probability that the accused will not stand trial for a capital offense. Kentucky's "guided discretion" system of capital sentencing has failed to eliminate race as a factor in this process.

Keil, Thomas and Gennaro F. Vito, "Race and the Death Penalty in Kentucky Murder Trials: 1976-1991", American Journal of Criminal Justice, Vol. 20, No.1, (1995); "Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing Research Indicates Pattern of Racial Disparities", United States General Accounting Office, February 1990, citing Keil, Thomas and Gennaro Vito, "Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes," Justice Quarterly, Vol. 7, No., 1, (March 1990); Keil, Thomas and Gennaro Vito, "Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale", Criminology, Vol. 27, No. 3 (1989); and Vito, Gennaro and Thomas Keil, "Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period," The Journal of Criminal Law & Criminology, Vol. 79, No. 2, (Summer 1988).

Race is not a permissible basis on which to decide who lives and who dies. Therefore, a death penalty scheme is unconstitutional if it allows race to be a basis on which the decision is made, because race is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," Furman, supra, at 313.

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or mentally inferior might . . . be less favorably inclined toward petitioner's evidence of mental disturbance

> as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of certainty of the capital sentencing determination. We have struck down capital sentences when we found that the circumstances under which they were imposed created an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim or mistake.

Turner v. Murray, 476 U.S. 28, 35-36 (1986). See also §§ 1, 2, 3, 17, KY Constitution; KRS 532.300.

Because our capital punishment scheme apparently is unable to eliminate this racial bias, and because even the U.S. Supreme Court has virtually conceded that fairness and rationality cannot be achieved in the administration of the death penalty, our capital punishment scheme is unconstitutional. McClesky v. Kemp, 481 US. at 279, 313, note 37.

In addition to race, there is a strong prejudice shown in regards to the gender of the defendant. As of July 1, 2005 there were 54 women on death row (NAACP Legal Defense Fund). This constitutes 1.6% of the total death row population of about 3,415 persons and less than 0.1% of the approximately 50,000 women in prisons in the United States. In the past 100 years, approximately 40 women have been executed in the U.S, including 11 since 1976.[10]

This Court has a statutory duty to review whether the death penalty was imposed on the basis of any arbitrary factor. KRS 532.075(3)(a). The race of the victim and the

[10] Source: Death Penalty Information Center, http:\\deathpenaltyinformationcenter.org.

gender of the accused are impermissibly arbitrary bases for determining who should receive the ultimate penalty.

Marc Chapman's death sentence should be vacated pursuant to the 5th, 6th, 8th and 14th Amendments, US Constitution and §§ 1, 2 , 3, 7, 11, 17, 26, KY Constitution.

D. Prosecutorial Discretion Makes Arbitrariness Inherent.

This Court can take judicial notice that most capital indictments are resolved by a plea. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the cases in which it is not...." Furman, supra.

Prosecutors have unlimited discretion whether to seek death in a given case. There are no statewide guidelines and no procedures for pretrial judicial review of the prosecutorial decision in contrast to the practice in other states. See State v. Watson, 312 S.E.2d 448, 451-52 (NC 1984); State v. McCrary, 478 A.2d 339 (NJ 1984); Ghent v. Superior Court, 153 Cal.Rptr. 720, 727-28 (CalApp 1979). When the vast majority of capital indictments are plea bargained, that decision represents the most important decision in the sentencing process. Nowhere in Kentucky's legal system is there more absolute and arbitrary power over the lives and liberty of criminal defendants than in the prosecutor's authority to plea bargain a capital indictment downward.

Of the 35 men and 1 woman who resided on Kentucky's death row at the time of Marc Chapman's sentencing, 15 (43%) came from two counties. The decision to impose the death sentence depends not just on what crime has been committed, but on which side of the street the defendant happened to be standing. Kentucky has 60 judicial districts and 60 prosecutor/decision makers, each with different values, motivations and influences.

Indeed, one Kentucky prosecutor has decided that his religious convictions prevent him from prosecuting a capital case.[11] With no requirement to examine both sides of the "scale," no uniform standards to guide the decision-making process and no judicial check on the prosecutor's discretion, the selection of who will be subject to capital prosecution is influenced by diverse political factors which cause the system as a whole to be arbitrary and capricious.

This arbitrariness could not be better highlighted than by the prosecutor's actions in this case where the prosecutor orchestrated a guilty plea in exchange for the death sentence in order to satisfy both the victims' desire for revenge and the defendant's wish for "suicide by court". Reversal of Marc Chapman's death sentences is required. 5th, 6th, 8th, and 14th Amendments, US Constitution and §§ 1, 2, 3, 7, 11, 17, 26, KY Constitution.

E. There Is A Danger Of Executing The Innocent.

There is a growing awareness of an unacceptably high rate of wrongful conviction in capital cases. At least 114 persons have been freed from death sentences after evidence of their innocence emerged. Of that total, nearly 43% were on death row from 10 to 33 years before this happened.[12] There is no way to tell how many of the more 1000 people executed since 1976 may also have been innocent. See Herrera v. Collins, 506 U.S. 390, 417-418 (1992). There are "serious questions" about whether the death penalty is being fairly administered in the United States. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," Supreme Court Justice Sandra Day O'Connor said in a Minnesota speech. *Minneapolis Star Tribune*, 7/3/01. The Furman demand that the government fix the arbitrariness and capriciousness of death

[11] Source: Death Penalty Information Center.
[12] *Id.*

sentencing has not been realized. Instead, Justice White's premonition in his concurrence in Gregg v. Georgia, supra at 226, that "[m]istakes will be made and discriminations will occur which will be difficult to explain," has come true. The fallibility of the death machinery is no longer a matter of mere speculation; it is a proven fact. Such mistakes require this Court to hold our death penalty scheme unconstitutional. 5th, 6th, 8th, and 14th Amendments, US Constitution and §§ 1, 2, 3, 7, 11, 17, 26, KY Constitution.

F. Conclusion.

One reason that capital punishment gets meted out in an arbitrary, capricious and disproportionate way is that the rules, which have evolved in an ostensible attempt at achieving rationality in these cases, are so complicated and confusing that decisions end up being made on some more simple basis, outside the rules.

> (D)eath penalty jurisprudence has become so complex and theoretically abstract that the only way to try to understand the reasons for and impact of its many subtle distinctions is to resort to carefully crafted hypotheticals. Something is terribly wrong when a body of law upon which we rely to determine who lives and who dies can no longer, in reality, reasonably and logically be comprehended and applied; when, in examining a statutory scheme and analyzing instructions and interrogatories (to juries), we are left to reach conclusions by piling nuance upon nuance; when we cannot even agree upon the appropriate standard of review in cases in which lives hang in the balance. Yet this is how cluttered and confusing our nation's effort to exact the ultimate punishment has become. This cannot be what certain fundamental principles of liberty and due process embodied in our Constitution, principles upon which I need not elaborate here, are all about. . . . Elusive and complicated distinctions, replete with incomprehensible subtleties of the highest order, must not be the talisman that decides whether one should live or die."

Flamer v. Delaware, 68 F.3d 736, 772 (3rd Cir., 1995) (Judges Lewis, Mansmann, and McKee dissenting).

The complexity of the capital punishment system has rendered that system unreliable to validly decide who should live and who should die. It has also made the death penalty process so cumbersome and time-consuming that, as we slog through years of complicated appellate and post-conviction procedures, the condemned person is subjected to the cruelty, inhumanity, and degradation of suffering many years under sentence of death. That condition is itself an unconstitutional punishment under the state and federal constitutions. See Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Justice Stevens respecting denial of certiorari); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting); Knight v. Florida, 120 S.Ct. 459, 462-463 (1999) (Breyer, J., dissenting from denial of certiorari).

Former Supreme Court Justice Harry Blackmun wrote that he was "morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can save the death penalty from its inherent constitutional deficiencies." Callins v. Collins, 510 U.S. 1141 (1994), (Blackmun, J., dissenting). The "inherent constitutional deficiencies" include our inability to reconcile the competing constitutional requirements of (a) across-the-board rationality and consistency on the one hand, and (b) fairness and individualized sentencing on the other hand, which is exacerbated by the fact that the federal courts have now been hamstrung by Congress, (see, e.g., the federal Anti-Terrorism and Effective Death Penalty Act), and the Supreme Court itself, (see, e.g., Teague v. Lane, 489 U.S. 288 (1989); McCleskey v. Kemp, supra; Herrera v. Collins, supra.; and Coleman v. Thompson, 501 U.S. 722 (1991)), from being effective forums for remedying federal constitutional errors.

In a dissenting opinion in the Kentucky capital case Moore v. Parker, 425 F.3d 250, 268-270 (6th Cir.2005), Judge Boyce Martin of the U.S. Court of Appeals for the Sixth Circuit summed up many of the constitutional problems with the death penalty:

> I have been a judge on this Court for more than twenty-five years. In that time I have seen many death penalty cases and I have applied the law as instructed by the Supreme Court and I will continue to do so for as long as I remain on this Court. This my oath requires. After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.
>
> The flaws are numerous and the commentators have documented them well. There have been numerous death row exonerations. In fact, in some states the pace of exonerations competes with the pace of executions. See e.g., Death Penalty Information Center Searchable Database, http://www.deathpenaltyinfo.org/executions.php, last accessed September 6, 2005 (indicating that since 2000, Louisiana has executed two individuals while five individuals have been exonerated from death row). Blatant racial prejudice continues to infest the system. See, e.g. Miller-El v. Dretke, 125 S. Ct. 2317 (2005). Peremptory challenges tilt the balance from the outset in favor of death. Id. at 2340 (Breyer, J., concurring). The election of state judges creates another subtle bias toward death. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html. Crime labs are unreliable, see Ralph Blumenthal, Officials Ignore Houston Lab's Troubles, Report Finds, N.Y. TIMES, A10 (July 1, 2005); The Innocence Project, DNA News, http://www.innocenceproject.org/dnanews/index.php (documenting suspension of DNA testing in Houston, Texas as a result of lab incompetence); see also House v. Bell, 386 F.3d 668 (6th Cir. 2004), cert. granted 125 S. Ct. 2991 (2005), witness identifications continue to prove faulty, and false testimony and false confessions plague the system, see e.g., The Innocence Project, http://www.innocenceproject.org/case/display_profile.php?id=07 (case of Rolando Cruz). The death penalty has proved to be an ineffective cure for society's ills, public support continues to erode, and we share the dubious distinction of being the only western democracy that continues to put its own citizens to death. Of particular relevance to this case, the bad lawyering and incomprehensible arbitrariness that permeate the system should disgust any person concerned with the fair administration of criminal justice. Many of these flaws are rightfully brought to the attention of the nation's political leaders. Notwithstanding, many of these flaws are

legally relevant to the Eighth Amendment question — namely, under "evolving standards of decency," Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion), "whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable." Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring).

An even better argument, in my opinion, is that the death penalty violates the Fourteenth Amendment because it is so transparently arbitrary that the system in its entirety fails to satisfy due process. More than ten years have passed since Justice Blackmun's statements in Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari), regarding the failure of the death penalty system due to the absence of consistency, rationality, and fairness in its administration. It has only gotten worse. Justice Stevens's recent address to the American Bar Association thoughtfully makes the case that there are "special risks of unfairness" in the administration of the death penalty. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005) ("[W]ith the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously. That evidence is profoundly significant - not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice . . . My review of many trial records during recent years has, however, persuaded me that there are other features of death penalty litigation [aside from ineffective assistance of counsel] that create special risks of unfairness.").

As noted above, while the system suffers from many flaws, much of the arbitrary imposition of the death penalty stems from the exceedingly distressing fact that during all my years on the bench, the quality of lawyering that capital defendants receive has not substantially improved. In many cases it has deteriorated. In fact, one of the most clear examples of the arbitrariness of the death penalty is the common knowledge that those defendants with decent lawyers rarely get sentenced to death. Death has more to do with extra-judicial factors like race and socio-economic status than with whether death is deserved. A system, whose basic justification is the interest in retribution and general deterrence, is not served when guided by such irrelevant factors. Nor should a system of life and death hinge on the proficiency of counsel.

I have no delusions of grandeur and I know my place in the judiciary. My oath requires me to apply the law as interpreted by the Supreme Court of the United States. I will continue to do as I am told until the Supreme Court concludes that the death penalty cannot be administered in a

> constitutional manner or our legislatures abolish the penalty. But lest there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce.

This Court should conclude, like Judge Martin, that the death penalty is a farce and that it is unconstitutional for all of the reasons stated above. Because it is unconstitutional, Marc Chapman's death sentence must be reversed.

13. LETHAL INJECTION AND ELECTROCUTION AS FORMS OF EXECUTION ARE CRUEL AND UNUSUAL PUNISHMENT.

This issue is not preserved.

"Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). Marc Chapman was sentenced to death by lethal injection. KRS 431.220(1)(a). The crucial factor in assessing whether lethal injection violates the prohibitions against cruel and unusual punishment is whether, as a method of execution, it is contrary to the "evolving standards of decency that mark the progress of a maturing society[.]". Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958). (plurality opinion)).

To meet the "evolving standards of decency" test a mode of execution must ensure a quick and painless death. This principle stems from the recognition that the 8th Amendment prohibits "the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion). Punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering [.]" Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). "The traditional

humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947). Thus, for the condemned to suffer a lingering or painful death violates the constitutional prohibitions against cruel and unusual punishment.

This mode of execution does not comport with 8th Amendment and §17 requirements because of the substantial likelihood that it will result in undue pain and suffering for the inmate. There are numerous instances of botched executions that stemmed from the use of lethal injections. See Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 139-141 (2002) (Table 9); see also Michael Radelet, "On Botched Executions" Peter Hodgkinson and William Schabas (eds).; Michael Radelet, *Post-Furman Botched Executions*, available at www.deathpenaltyinfo.org (providing information on 24 botched lethal injections in ten states including at least eight executions where the inmate was conscious); Stephen Trombley, *The Execution Protocol*, (1992).

Lethal injection involves the use of three drugs administered through an IV catheter. Sodium Pentathol is an ultrashort-acting barbiturate that induces brief general anesthesia; Pavulon, a curare-based drug, paralyzes the condemned; and Potassium Chloride stops the heart. Sodium Pentathol does not necessarily cause instantaneous anesthesia. Drug manufacturers warn that without careful medical supervision of dosage and administration, barbiturates can cause "paradoxical excitement" and can heighten sensitivity to pain. See Physicians Desk Reference, 50th Ed. 1996 at 438-40. Manufacturers warn against administration by IV injection unless a patient is

unconscious or out of control. Id. An inmate's weight, physical condition and age are critical when adjusting dosage.

Because doctors are prohibited from participating in the administration of lethal injection, KRS 431.220(3), proper consideration of these factors is not assured. There is a great risk of unnecessary and wanton infliction of severe pain and suffering. Ironically, Pavulon has been outlawed by the Tennessee legislature for euthanization of "living creatures." Tenn. Code Ann. 44-17-303(c), 39-14-201. Lethal injections are "error prone" under the best of circumstances and can leave prisoners paralyzed, but conscious during a painful death. The administration of the three drugs has created numerous, horrific mistakes. Radelet, supra.

Should this Court hold that lethal injection is forbidden constitutionally as a method of execution, KRS 431.223 requires that a prisoner be executed in the manner in existence before the lethal injection statute was enacted – electrocution. But electrocution is also a cruel and unusual punishment. Execution by electrocution involves a reversion to the penal style of a preceding era; the condemned prisoner:

> cringes, leaps, and fights the straps with amazing strength. The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire . . . sounds like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber . . . the prisoner almost literally boils . . . . The body frequently is badly burned and disfigured.

Glass v. Louisiana, 471 U.S. 1080, 1087-88 (1985) (internal citations omitted) (Brennan, J., dissenting from the denial of certiorari on the constitutionality of electrocution).

The "electric chair has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber." Jones v. Florida, 701 So.2d 76, 87-99 (Fla. 1997) (Shaw, J., dissenting). With each electrocution, one waits in dread anticipation as a "barbaric spectacle more befitting a violent murderer than a civilized state [is] played . . . on the world stage." Provenzano v. Moore, 744 So.2d 413, 441 (Fla. 1999) (Shaw, J. dissenting). As many legislatures and courts have recently concluded, "[t]here comes a time when the Constitution must say 'enough is enough.'" Id.

Legislatures around the country have consistently abandoned this archaic method of taking human life. One court, the Georgia Supreme Court, has also held that electrocution violates the 8th Amendment. No other country in the world currently uses electrocution as a form of punishment. Within the United States, only Nebraska out of 40 death penalty jurisdictions including the federal government and the military employs electrocution as the sole method of execution. Kentucky, like Georgia, should abolish execution by electrocution for all time.

Section 17 of the KY Constitution forbids the use of cruel punishment. "Punishments are deemed cruel when they involve torture or a lingering death...." In re Kemmler, 136 U.S. 436, 447 (1890). The prohibition against cruel and unusual punishment embraces unnecessary mental as well as physical pain and suffering during the execution process. Weems v. U.S., 217 U.S. 349, 370 (1909); Trop v. Dulles, supra (Brennan, J., concurring). Central to the analysis is the **risk** of inflicting substantial and prolonged pain. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) and Hellings v. McKinney, 509 U.S. 25, 36, (1993). Though Kentucky may not be constitutionally obliged to make executions absolutely pain-free, significant, conscious pain that lasts for

more than a few seconds is constitutionally intolerable. See Fierro v. Gomez, 865 F.Supp. 1387, 1413 (N.D. Cal. 1994).

This Court should rule that lethal injection and electrocution violate the 8th Amendment and §17 prohibitions against cruel and unusual punishment and vacate Marc Chapman's death sentences.

14. RESIDUAL DOUBT BARS DEATH SENTENCE

Residual doubts about a capital defendant's guilt or moral culpability can be considered and can legitimately support a sentence less than death. Lockhart v. McCree, 476 US 162, 181-182 (1986). This Court has implicitly acknowledged that the existence of a genuine, if not reasonable, doubt about guilt is a proper and necessary factor to consider in determining whether death is appropriate by inclusion of item C(11) in the trial judge's report, asking whether the evidence "forecloses all doubt respecting the defendant's guilt?" Mr. Chapman was permitted to enter a guilty plea in exchange for a death sentence in what was a self-described attempt at "suicide by court." The proceedings in this unusual case raised more questions about Mr. Chapman's mens rea than they answered, and there are substantial doubts about his competency to waive counsel, trial, jury sentencing, mitigation and all penalties except death. The reliability of a guilty plea taken under such circumstances is highly questionable. If there is any case where this Court should hesitate in affirming without complete confidence in the reliability of the proceedings, it is Mr. Chapman's case. Because of the aforementioned doubts, imposition of a death sentence in this case is arbitrary and unreliable, and would violate the 8th, 14th Amendments, US Constitution; § 2, 3, 11, 17, 26, KY Constitution.

At a minimum, this Court should reduce Mr. Chapman's death sentences to some form of life imprisonment.

15. CUMULATIVE ERROR

Assuming this Court does not find that any individual issue is sufficient to require reversal, the cumulative effect of the preceding errors render Marc Chapman's convictions and sentences arbitrary and require that they be set aside. Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1993); Sanborn v. Commonwealth, 754 S.W.2d 534, 542 – 549 (Ky. 1988). The cumulative effect of these errors denied his right to a fair and rational sentencing hearing, leading to his arbitrary and unreliable death sentence. Therefore, the 5th, 6th, 8th and 14th Amendments to the US Constitution and §§ 1, 2, 3, 7, 11, 17, 26 of the KY Constitution require that his convictions and sentences be set aside and the case remanded for a new trial or for a new penalty phase hearing in which the death sentence is not an option.

CONCLUSION

The judgment of the Boone Circuit Court should be reversed.

Respectfully submitted,

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