mately warranted further inquiry, but did not justify disqualification without substantiation.

*Discussion*

The importance of this case involves matters relevant to autonomy in decision-making. It affirms that courts must respect the decisions that individuals make in choosing who would make their decisions in the event of incapacity and in retaining counsel of their choice to represent them. Individual wishes are generally upheld as long as there is no suspicion of lack of capacity. However, when a named conservator or counsel has an apparent personal interest in controlling the incapacitated individual's assets, such conflicts of interest may be considered in a legal challenge to the ability of a conservator, guardian, or attorney to act in the best interests of the individual, especially when that individual's competence is in question. In this case, the court also affirmed the importance of clearly defined prioritization of parties who may be in line to become a conservator of an incapacitated individual. Although trial courts retain the discretion to bypass individuals with priority if necessary, this decision again must be based on a "firm factual foundation," and not merely suspicions of conflict of interest. This case reflects the legal system's desire to ensure appropriate legal representation and transfer of decision-making authority.

# Competence to Plead Guilty and Seek the Death Penalty

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### A Competent Defendant May Enter Into a Plea Agreement to Forgo a Jury Trial and Sentencing and Volunteer for the Death Penalty

In *Chapman v. Commonwealth*, 2007 Ky. LEXIS 178 (Ky. 2007), the Supreme Court of Kentucky affirmed the decision of the Boone circuit court allowing a competent defendant to enter into a plea agreement to forgo a jury trial and sentencing and volunteer for the death penalty. The Kentucky Supreme Court examined the legal standards for competence to waive counsel, to enter a guilty plea, and to seek a punishment of death.

*Facts of the Case*

In August 2002, Marco Allen Chapman entered the home of Carolyn Marksberry and stabbed her and her three young children, resulting in the death of two of the children. Mr. Chapman told authorities that he "bound Ms. Marksberry with a vacuum cleaner chord and gagged her with duct tape." He then stabbed her and the children. When arrested, Mr. Chapman asked a policeman to "do me a favor and put a bullet in my forehead." The trial court ordered the first of three competency evaluations at the Kentucky Correctional Psychiatric Center (KCPC) during pretrial proceedings. Dr. Steven Free, a psychologist at KCPC, testified that, despite having a history of mental health-related problems, Mr. Chapman was competent to stand trial.

Mr. Chapman wrote the trial court asking to "dismiss his attorneys, waive a jury trial and sentencing, plead guilty to all charges, and be sentenced to death," prompting a second competency evaluation. Dr. Free believed that Mr. Chapman was competent but thought that his legal choices might change with treatment. The trial court ordered the defendant to KCPC for 30 days of treatment and evaluation. A few weeks later, in a third competency hearing, Dr. Free found Mr. Chapman competent. The trial court ruled that he was competent to "fire his attorneys, to plead guilty, and to seek death." Over objections from Mr. Chapman and his former attorneys, the trial court appointed the same lawyers as standby counsel. At sentencing, the trial court acknowledged receiving a psychological report delivered by standby counsel. It had considered psychological evidence in determining competency on all three occasions, but did not consider it as mitigating evidence, citing Mr. Chapman's choice not to present mitigating evidence. He was sentenced to death.

The Department of Public Advocacy filed an appeal on Mr. Chapman's behalf raising numerous claims: (1) the death penalty is unconstitutional; (2) lethal injection and electrocution violate the Eighth Amendment; (3) Kentucky's method of proportion-

ality review of death sentences is unconstitutional; (4) his death sentence was arbitrary and disproportionate; (5) the trial court erred by requiring the same attorneys he had already fired to serve as standby counsel; (6) the trial court erred in refusing to consider mitigating evidence; (7) the trial court should have used a more stringent competency standard given his mental health and abuse history; and (8) he should not be permitted to commit "suicide by court."

*Ruling and Reasoning*

The Kentucky Supreme Court cited prior rulings concluding that Kentucky's death penalty statute is constitutional (*Thompson v. Commonwealth*, 147 S.W.3d 22, 55 (Ky. 2004)). Similarly, repeated rulings have held that neither lethal injection nor electrocution violate the Eighth Amendment (*Wheeler v. Commonwealth*, 121 S.W.3d 173, 186 (Ky. 2003)). The court upheld their process for proportionality review as constitutional (*Sanders v. Commonwealth*, 801 S.W.2d 665, 683 (Ky. 1990)). After conducting the required proportionality review (Ky. Rev. Stat. Ann. § 532.075(3) (2007)), the court stated that Mr. Chapman's death sentence was not disproportionate. He had "brutally stabbed two innocent children to death," and the court found that ample evidence met the statutory aggravating factors.

The court considered the matter of a *pro se* defendant's having standby counsel and determined that the trial court had a right to appoint standby counsel despite his objections (*Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000)) and found no error in appointing the same lawyers. The court next considered the question of mitigating evidence. The trial court had refused to consider a psychological report delivered before sentencing as mitigating evidence, because it was improperly submitted without the approval of the defendant. The Kentucky Supreme Court supported the trial court's ruling that once a defendant is validly proceeding *pro se*, standby counsel may not "override that *pro se* defendant's wishes as to what evidence, if any, will be presented on behalf of the defense."

Next came the question of whether Mr. Chapman was competent to plead guilty and seek execution. Under Kentucky law (Ky. Rev. Stat. Ann. § 504.060(4) (2005)), incompetent to stand trial means that "[the defendant lacks the] capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense." The United States Supreme Court has rejected the notion that competence to plead guilty or to waive the right to counsel should be held to a higher standard than competency to stand trial (*Godinez v. Moran*, 509 U.S. 389, 398 (1993)). Since Mr. Chapman was found competent under Kentucky law, he was competent to plead guilty and seek the death penalty. The court then considered the question of whether a defendant may plead guilty to a capital offense to seek the death penalty: "There is nothing inherently unconstitutional about a person deciding to take responsibility for his or her criminal misconduct without having first undergone a full-blown trial." The court argued that adhering to a defendant's choice honors personal dignity and concluded that safeguards such as "ensuring that the defendant is competent, that a factual basis exists to support the imposition of the death penalty, and our proportionality review—amply protect the state's interests." The court noted that a trial court is not obligated to accept plea agreements, regardless of whether the plea calls for the death penalty. In reviewing the trial court's acceptance of Mr. Chapman's plea, it upheld the death sentence because it was based on appropriateness for the crimes, and not on the defendant's wishes or plea agreement. Because of the careful scrutiny required in accepting such a plea, the court found that it is not possible for a defendant to use capital punishment to commit "suicide by court."

*Discussion*

The United States Supreme Court has established that a defendant may not be tried unless competent (*Pate v. Robinson*, 383 U.S. 375 (1966)), with the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceedings against him" (*Dusky v. United States*, 362 U.S. 402 (1960)). In *Godinez v. Moran*, the U.S. Supreme Court ruled that there is no difference in the competency standard at any point in a trial. The Supreme Court of Kentucky closely followed this ruling in their decision about the standard of competency Mr. Chapman required when entering a plea of guilty and waiving his right to counsel.

Although *Godinez v. Moran* has been determinative in the area of competency standards for various rights, the question of having additional safeguards

in capital cases is interesting. Should there be greater protections for waivers when the defendant's life is on the line? In the *Chapman* appeal, it was argued that Kentucky should adopt the Arkansas statute that holds that a defendant charged with capital murder is prohibited from:

> . . . waiving either a jury trial on the issue of guilt or the right to have his sentence determined by a jury unless (1) the court determines the waiver is voluntary and was made without compulsion or coercion, (2) the death penalty has been waived by the State, and (3) the State has assented to the defendant's waiver of his right to a jury trial, and such waiver has been approved by the trial court [*Newman v. State*, 106 S.W.3d 438, pp 456–57 (Ark. 2003)].

Another interesting notion raised is that a defendant may use the death penalty to commit "suicide by court." In rejecting this argument, the Kentucky Supreme Court found that because Mr. Chapman's plea was "competently, knowingly, intelligently, and voluntarily made," and because the death penalty was not a "disproportionate sentence for Chapman's heinous offenses" (*Chapman*, p 58), it is not suicide by court. In a concurring opinion, Chief Justice Lambert wrote that the "imposition of the death penalty is the ultimate expression of state outrage for criminal conduct" and therefore, "the wishes of the defendant, whether motivated by sincere remorse, desire to escape life imprisonment, or to assert control, should play no part in the penalty determination" (*Chapman*, p 71). In this light, the defendant's motivation and his intention to proceed with a death sentence is divorced from the imposition of the sentence.

Finally, the Kentucky Supreme Court considered the right to present mitigating evidence and upheld that a competent *pro se* defendant may refuse this right. However, this ruling seems contrary to that in *Gregg v. Georgia*, 428 U.S. 153 (1976), in which the U. S. Supreme Court argued that certain safeguards must be in place to prevent implementation of the death penalty in an arbitrary and capricious manner. Specifically, the majority argued:

> . . . [T]hese procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury . . . reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die . . . . Are there any special facts about this defendant that mitigate against imposing capital punishment? [*Gregg*, p 197].

In the *Gregg* decision, the U.S. Supreme Court emphasized the need to know about the defendant via mitigating evidence before imposing the death penalty. The presentation of mitigating evidence may be viewed as more than just the defendant's optional right, but a vital safeguard in protecting the state's interest in assuring that all death sentences are applied in a consistent, nonarbitrary, and just manner.

# Mitigating Evidence in a Death Penalty Case

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## A Knowing and Intelligent Waiver Is Not Required to Waive Mitigating Evidence in Capital Case

In *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), the U.S. Supreme Court upheld the waiver of mitigating evidence by a capital defendant and the resulting death sentence. The Court found no requirement for a knowing and intelligent waiver of the right to present mitigating evidence and found no error in defense counsel's failure to investigate and prepare such evidence before sentencing.

### *Facts of the Case*

Jeffrey Landrigan was convicted in Arizona of second-degree murder in 1982 and assault and battery with a deadly weapon in 1986. After escaping from prison, he was convicted of theft, second-degree burglary, and felony murder in 1989. At sentencing, his defense counsel tried to present mitigating evidence consisting of testimony from his ex-wife and birth mother, both of whom refused to testify at his request. Defense counsel advised her client against this position. When the court asked him if he had instructed his lawyer not to present mitigating evidence and if he understood the implications of refusing such evidence, he answered affirmatively. The mitigating testimony available would have demonstrated that his birth mother used drugs and alcohol, that he had abused drugs and alcohol, and that he had been