

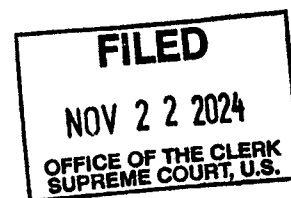
No. 2021 - SC - 0492

ORIGINAL

24-6317

IN THE

SUPREME COURT OF THE UNITED STATES



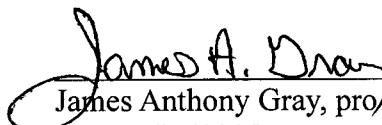
JAMES ANTHONY GRAY – PETITIONER

vs.

DANIEL AKERS, WARDEN, LEE ADJUSTMENT CENTER – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI


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QUESTIONS PRESENTED

Introduction.

At the conclusion of his third trial under indictment no. 2007-CR-00211, James Anthony Gray (Anthony) was convicted for the murder of his father and mother, James and Vivian Gray.¹ Anthony was sentenced to fifty (50) years for the two murder charges and five (5) years for tampering with physical evidence to run consecutively for a total of fifty-five (55) years. The Kentucky Constitution (Ky. Const.) §115 provides for a criminal defendant to undertake one appeal as a matter of right. The Ky. Const. also requires the appeal of any imposed sentence of twenty (20) years or greater shall be taken directly to the state court of last resort – the Kentucky Supreme Court. Ky. Const. §110(2)(b). Counsel on appeal raised six claims of error. In rendering its opinion the six participating member unanimously agree the tampering conviction must be reversed and remanded with directions for the trial court to vacate that conviction.² All other assignments of error were grouped into a heading labeled “The Murder Convictions.” Under this Heading the court did not make any factual findings nor did it make any legal reasoning to support a decision. The court merely stated the six sitting Justices were equally divided. As a result the court decreed according to Supreme Court Rule (SCR) 1:020(1)(a) the Scott County trial court conviction stands affirmed.

1 To avoid confusion, James Anthony Gray will hereinafter be referred to as Anthony, and his father James Gray will be referred to as Mr. Gray.

2 The Kentucky Supreme Court consists of one Chief Justice and six Associate Justices. Ky. Const. §110(1). For Anthony's appeal Chief Justice VanMeter recused himself.

Question I.

Did the failure by the Kentucky Supreme Court to adjudicate the claims of error challenging the two murder convictions deny Anthony of his right to a ruling on the merits of his appeal violating Due process guaranteed by the Fourteenth Amendment; and if so, in this specific instance are Kentucky Revised Statute (KRS) 21A.060³ and SCR 1.020(1)(a) unconstitutional as applied to Anthony?

Introduction.

Anthony was indicted in 2007 and the subsequent trial resulted in a hung jury and a mistrial declared. At his second trial Anthony was found guilty, but his conviction was vacated by the Kentucky Supreme Court on direct appeal. In rendering its decision the court ruled the trial court abused its discretion by excluding Anthony's alternative perpetrator (hereinafter aaltperp) evidence. The court went on to establish Anthony had presented more than enough information to warrant admission of his aaltprep evidence. Despite the high court's ruling the prosecution re-litigated the admission of Anthony's aaltprep evidence. The trial court filed an order allowing the prosecution to subpoena the defense witness to a pre-trial hearing to question them under oath. The trial court also required counsel to turn over all remaining witness statements, even if the notes from counsel's work product. The court's orders granting the prosecution's request for a hearing and all witness statements allowed the prosecution to invade Anthony's defense strategy a head of trial, and interfered with counsel's ability to make strategic decisions as the trial progressed affecting the framework of the trial itself.

3 For KRS 21A.060 see pg. 3 and for SCR 1.020(1)(1) see pg. 4.

Question II.

Did the trial court's failure to honor the law of the case doctrine and disregard for the writ of prohibition which allow the Commonwealth to preview alternative perpetrator evidence and subpoena and question witnesses under oath prior to trial deny Anthony of his right to present a complete defense and interfere with defense counsel's ability to make strategic decisions result in a structural error?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Gray v. Commonwealth, Case No. 2021-SC-0492-MR, Kentucky Supreme Court.
Denial of request for rehearing, Judgment entered August 22, 2024
Direct Appeal, Judgment entered May 16, 2024. (Gray II)

Gray v. Commonwealth, Case No. 07 – CR – 00211, Scott Circuit Court.
Conviction and Sentence, Judgment entered

Gray v. Commonwealth, Case No. 480 S.W.3d 253, Kentucky Supreme Court.
Direct Appeal – Reversing and Remanding, Judgment entered December 13, 2019 (Gray I)

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APPENDIX E	<i>Gray v. Commonwealth</i> , Case No. 480 S.W.3d 253 (Ky. 2016), (Gray I) Kentucky Supreme Court. Direct appeal reversing convictions and remanding for a new trial. Judgment entered February 18, 2016.
APPENDIX F	<i>Gray v. Commonwealth</i> , Case No. 07-CR 00211, Scott Circuit Court Conviction and Sentence, Judgment entered September 27, 2021.
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**IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is:

- ☐ reported at _____; or
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Scott County Circuit Court appears at Appendix B to the petition and is:

- ☐ reported at _____; or
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☒ For cases from state courts:

The date on which the highest state court decided my case was June 13, 2024.

- ☐ No petition for rehearing was timely filed in my case.
☒ A timely petition for rehearing was denied by the Kentucky Supreme Court on Aug. 22, 2024, and a copy of the order denying rehearing appears at Appendix C.
☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A__.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment:

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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution

Ky. Const. §110. (in relevant part) Referenced on pg. 11, 12, 13
§110. Composition — Jurisdiction — Quorum — Special justices — Districts — Chief justice.

(1) The Supreme Court shall consist of the Chief Justice of the Commonwealth and six associate Justices.

(2)
(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

(3) A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two Justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of the cause.

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Complete Section at Appendix H

Ky. Const. §115 Referenced on pg. 11
§115. Right of appeal — Procedure.

In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the general assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

Compiler's Notes.

The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the Constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

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Kentucky Revised Statute (KRS)

KRS §26A.015. (in relevant part) Referenced on pg. 12
KRS §26A.015. Disqualification of justice or judge of the Court of Justice, or master commissioner.

(3)

(a) Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice.

(b) Any master commissioner disqualified under the provisions of this section or unable to discharge the duties of his office for any other reason shall be replaced by a special commissioner who shall be appointed by the judge of the court before whom the action is pending. The special commissioner shall meet the same qualifications as a master commissioner and shall take an oath and execute a bond as the regular commissioner is required to do.

Complete Statute at Appendix G

KRS §21A.060. Referenced on pg. 9
KRS §21A.060. Effect of equal division of court.

If the Supreme Court is equally divided in the decision of a case, the judgment, order or decree of the lower court shall stand affirmed.

History:
Enact. Acts 1976, ch. 67, § 7, effective March 23, 1976.

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KRS §507.020. Referenced on pg. 6
KRS §507.020. Murder.

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

History
Enact. Acts 1974, ch. 406, § 61, effective January 1, 1975; 1976, ch. 183, § 1; 1976 (Ex. Sess.), ch. 15, § 1, effective December 22, 1976; 1984, ch. 165, § 26, effective July 13, 1984.

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Supreme Court Rule (SCR) 1.020(1)(a) Referenced on pg. 9
Rule 1.020. The Supreme Court.

(1) Conduct of business.

(a) Final decisions and matters of policy. The final disposition of all appeals and original actions in the Supreme Court and matters of policy or administration shall be decided by a concurrence of at least four of its members, except that in appealed cases if one member is disqualified or does not sit and the court is equally divided, the order or judgment appealed from shall stand affirmed.

(b) The Chief Justice. The Chief Justice shall be the presiding officer of the court. Orders of the court shall be signed by the Chief Justice or one of its members acting on his behalf, unless otherwise provided by these Rules. Whenever the Chief Justice is absent or otherwise unable to act, the remaining six members shall act for and in his behalf in the order of their seniority on the court unless otherwise directed by the Chief Justice. Members whose terms of service are equal shall have precedence according to seniority in age.

(2) Terms.

(a) There shall be one annual term of the Supreme Court, coinciding with the calendar year.

(b) The provisions of CR 6.03 (1) and CR 77.01 apply to the transaction of business in the Supreme Court.

(3) Sessions. The Supreme Court will sit in open session for scheduled oral arguments and on such other occasions as it may determine.

(4) Court personnel. Officers and employees of the Supreme Court shall not engage in the practice of law.

History:

(Adopted October 14, 1977, effective January 1, 1978; amended February 7, 1980, effective May 1, 1980; amended July 6, 1982, effective October 1, 1982; amended effective July 8, 1983.)

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STATEMENT OF FACTS RELEVANT TO THE GRANTING
OF MR. JAMES ANTHONY GRAY'S
PETITION FOR CERTIORARI

James Anthony Gray (Anthony) was indicted in 2007 for two counts of murder (KRS 507.020 for allegedly killing his parents, and one count of tampering with physical evidence. Anthony's first trial March 1, 2012, resulted in mistrial when the jury failed to agree on a verdict. *Gray v. Commonwealth*, Case No. 2021-SC-0492-MR (Ky. 2024) (*Gray II*, Appendix A – 1n.1). The conviction in Anthony's second trial was reversed. *Id.* The court found his confession should have been suppressed, and alternative perpetrator (hereinafter aaltperp) evidence regarding Peter Hafer should have been admitted. *Id.* The facts as found by the Kentucky Supreme Court in *Gray I* are subject to the law of the case doctrine. *Brooks v. Lexington-Fayette Urb. Cnty Hous. Auth.*, 244 S.W.3d 747, 751 (Ky. App. 2007) (“The law of the case doctrine is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal.” quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)).

The relevant unchanged facts are as follows:

James and Vivian Gray were shot to death in their home. The Grays were generally considered affluent, having owned and operated a successful downtown business for decades. They had a tumultuous relationship with their son, James Anthony Gray. This family rift and allegedly missing wills that purportedly disinherited Gray made him an immediate person-of-interest, and ultimately the prime suspect in the official investigation.

About six months elapsed before the sheriff's investigators called Gray to the sheriff's office to answer questions ostensibly related to

the missing wills. He received Miranda warnings and opted to speak with investigators. After a brief break in the questioning, the investigators shifted gears, deciding to question Gray about his parents' murder. Five-and-a-half hours of unrecorded interrogation followed. Investigators used a number of different ruses and forms of trickery, including a forged lab report of DNA evidence linking Gray to the murders and an alleged phone call from a judge threatening the certain imposition of the death penalty if Gray did not confess to them. Shortly after the interrogation ended, the cameras came back on and Gray confessed to murdering his parents. He was promptly arrested.

Gray moved before trial to suppress this confession. The trial court denied his motion because, in light of the totality of the circumstances, the trial court could not conclude that the confession was involuntarily given. The trial court was admittedly troubled by the investigators' method of obtaining the confession but determined he could not conclude the confession was coerced.

Gray v. Commonwealth, 480 S.W.3d 253, 258-59 (Ky. 2016) (*Gray I*. See Appendix E).

After remand from the state supreme court, in preparation for the third trial the prosecution moved to hold hearings in which they could question the defense's aaltperp witnesses. (See Appendix B – 13).¹ The basis of the motion was for a determination as to whether or not the witness statements would be ruled out under the hearsay rules. (*Id.*). However the supreme court in making its findings determined admissibility of the aaltperp evidence would fall under the relevance and probative/prejudice balancing test of KRE² 403. *Gray I*, 480 S.W.3d at 267-68. To which the court held “we think Gray has more than enough probative information under this standard to warrant admission of his aaltperp evidence.” *Id.*, at 268. The court also addressed the admission of aaltperp testimony based on the hearsay rules and held:

1 Due to the extensiveness of the trial record (over 3000 pages), Anthony does not possess the entire contents. He cites to counsel's brief in the event the Court would like references to review the record.

2 Kentucky Rules of Evidence (KRE)

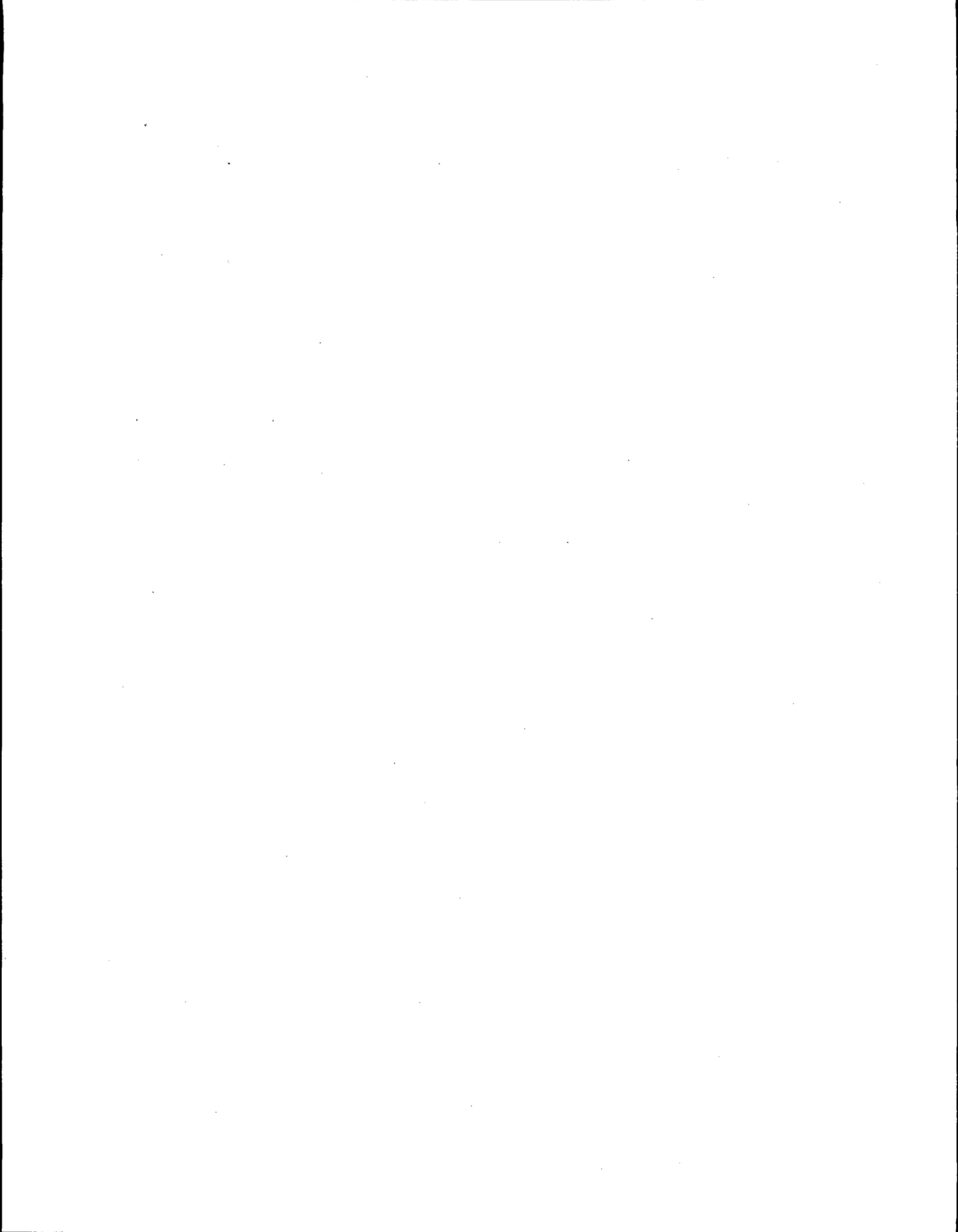
we also recognize that we have already held that Gray should have been allowed to introduce his aaltperp evidence at trial. If this questioning comes up on retrial, the trial court must review the testimony under this standard and may not base any of its decision on the aaltperp test for admissibility.

Gray I, 480 S.W.3d at 269.

Despite the supreme court's clear instructions, over counsel's objections the court entered an order which allowed the prosecution, to ahead of trial, subject the defense's aaltperp witnesses to testimony under oath. (See Appendix B – 14-16). Counsel explained that he was not required to turn over any statements, but did so to maximize efficiency because at that point Anthony had been incarcerated for over nine (9) years. (Id., at 18). After the hearing the prosecution continued to seek aaltperp witness testimony and statements. (Id., at 18-19). The trial court ordered both parties to provide opposing counsel all aaltperp statements. (Id., at 18). In response to the order counsel sought a writ of prohibition to prevent the defense from having to turn over any more of counsel's work product. (See Appendix B – 18).³ Counsel stressed his objection to turning over any witness statements and work product. Ultimately counsel turned over additional aaltperp evidence for an in camera review to avoid further delays. (Id., at 18-19). The court of appeals granted the writ of prohibition in part. (Id., at 22). Unfortunately by the time the writ was issued the harm had already occurred. The trial court recognized that most of the witness testimony had already been litigated.

At the conclusion of his third trial, Anthony was found guilty of the two murder charges and one count of tampering with physical evidence. (See APPENDIX F). The jury recommended all counts to run consecutively for a total sentence length of fifty-five years. (Id.).

³ Anthony has been unable to retrieve a copy of the writ of prohibition or the Kentucky Court of Appeal's Order granting the writ. (Case No. 19-CA-1312).



Anthony appeal his conviction to the Kentucky Supreme Court as a matter of right. On appeal Anthony presented six claims of error to the Kentucky Supreme Court. (See Appendix D). Chief Justice VanMeter recused himself, which left the remaining six justices to confirm or vacate Anthony's conviction. On appeal Anthony presented six claims of error. One claim was directed to the tampering with physical evidence conviction, (See Appendix D – 32-35); all other claims pertained to the murder convictions. The Justices unanimously agreed the conviction for the tampering charge required reversal. (See Appendix A – 2). However the six Justices were deadlocked three to three on the claims of error directed to the murder convictions. (See Appendix A – 2). Because of the even spit of the associate justices, by court rule Anthony's conviction was affirmed by default. See SCR 1.020(1)(a); KRS §21A.060

The failure by the Kentucky Supreme Court denied Anthony of his right to receive a decision on his direct appeal. Anthony now turns to this Honorable Court seeking a review and decision on his claims against the murder convictions.

REASONS FOR GRANTING THE PETITION

Reason for Granting Review for Question I.

Anthony's compelling reason for this Honorable Court to grant review is the failure by the Kentucky Supreme Court to adjudicate the merits of his claims of error denied Anthony of his constitutional right to appellate review of his conviction in violation of due process protected by the Fourteenth Amendment. In addition when previously presented with this situation from Kentucky – a trial court's order affirmed by an equally split court - this Court's predecessor granted certiorari and rendered a decision on the merits which reversed the judgment of the state supreme court. *Stone v. Graham*, 449 U.S. 39 (1980).

Reason for Granting Review for Question II.

Anthony presents two compelling reasons for this Honorable Court to grant review. The trial court's failure to follow the law of the case doctrine and its disregard for binding precedent by the higher appellate courts allowed the prosecution to obtain extraordinary discovery which fundamentally abridged his right to present a complete defense and interfered with defense counsel's ability to make strategic decisions resulted in a structural error in violation of due process protected by the Fourteenth Amendment. This type of error must not be allowed to stand. Secondly this was the first argument presented on appeal, but was not ruled upon by the Kentucky Supreme Court. If this court passes on reviewing the merits or does not remand to the state to hold a new appeal, Anthony will have been denied his right to take a direct appeal and will be forced to bring this claim on collateral review in which he will face the extensively stricter standards of Strickland and the AEDPA. See *Weaver v. Massachusetts*, 582 U.S. 286, 299-300 (2017).

ARGUMENTS IN SUPPORT OF GRANTING THE PETITION

Argument I: Anthony has been deprived of his constitutional right to appellate adjudication of the trial court's rulings.

Once a state has made appellate review an integral part in the final determination of guilt or innocence it must do so with procedures that comport with the demands of due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Kentucky through its constitution has established a first appeal as a matter of right. Ky. Const. §115; see also *Evitts v. Lucey*, 469 U.S. 387, 402 (1985).

For criminal proceedings in which a sentence of twenty (20) years or grater has been imposed, an appeal shall be taken directly to the states highest judicial body – the Kentucky Supreme Court. Ky. Const. §110(2)(b). Like many other states, Kentucky has provided an appeal as a matter of right to ensure the defendant has been lawfully convicted. *Evitts*, 469 U.S., at 402.

On appeal Anthony presented six claims of error to the Kentucky Supreme Court. (See Appendix D). Only one claim was directed to the tampering with physical evidence conviction. (See Appendix D – 32-35). The other five claims argued Anthony was convicted of the two murder charges in violation of his federal and state constitutional rights. (Appendix D – 10-31, 35-47). For the appeal Chief Justice VanMeter recused himself. and the remaining Justices unanimously agreed the conviction for the tampering charge required reversal. (See Appendix A – 2). However the six Justices were deadlocked three to three on the murder convictions. (See Appendix A – 2).

The failure to have an odd number of justices sitting allowed for an evenly split court, which is know to be problematic. *Presbyterian Church (U.S.A.) v. Edwards*, 594 S.W.3d 199, 204

(Ky. 2018) quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000). The amendment to the Kentucky Constitution, effective January 1, 1976, requires the Supreme Court to be made up of seven Justices, “the Chief Justice of the Commonwealth and six associate Justices.” Ky. Const. §110(1). Included in this section are directions to be taken in the event two or more justices have disqualified themselves. Ky. Const. §110(3). Interestingly the constitution does not address instances for when one justice is recused. *Fletcher v. Graham*, 192 S.W.3d 350, 366 (Ky. 2006) quoting *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 409 (Ky. 1992). Originally the supreme court had a policy in place mandating the Chief Justice to fill a vacancy created from one justice being disqualified. See *Kentucky Utilities Co.*, 836 S.W.2d at 409 (“Said procedure, appended hereto [section 1. Jurisdiction, ¶¶ 1 &2], provides for the replacement of a disqualified Justice by the Chief Justice pursuant to KRS 26A.015(3)(A).”). By 1999 the court had discontinued use of the policy. *Presbyterian Church (U.S.A.)*, 594 S.W.3d at 204n.11, citing *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999). Even though the policy had been rescinded by the court, the statute (KRS 26A.015(3)(a)) requiring a single justice who has been disqualified to be replaced is still the law in Kentucky. (See Appendix F).

States may not create barriers which impede an appellant from having a meaningful review of his assignment of errors. *Griffin*, 351 U.S., at 17-18. The failure by the supreme court to abide by KRS 26A.015(3)(a) created a barrier which deprived Anthony of his right to appeal. Once Chief Justice VanMeter recused himself, or at the latest once it was determined the court was deadlocked, it was the responsibility and duty of the court to appoint a replacement enabling the collective body to make an official decision.

For the transaction of business Kentucky requires a quorum consisting of a majority of

the Justices of the Supreme Court. Ky. Const. §110(3). As such a minimum of six justices are required in order to make a official decision. *Fletcher*, 192 S.W.3d at 366. see e.g. *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179, 183-84 (1967). A divided court resulting in a three (3) to two (2) split does not consist of a majority of the collective body required to be empower to act for the body. Ky. Const. §110(3); *WIBC, Inc. v. Federal Communications Com.*, 259 F.2d 941, 943 (D.C. Cir. 1958) ("The truth is that when six voted, it took four to control."). For this reason the constitution requires the Chief Justice to notify the Governor if two or more Justices decline or are unable to sit in the trial of any cause thereby requiring the Governor to appoint a sufficient number of Justices to constitute a full court. *Id.* "The Kentucky Constitution intentionally leaves the decision as to what should be done if only one justice disqualifies to the rule-making power of this Court." *Fletcher*, 192 S.W.3d at 366, quoting *Kentucky Utilities Co.*, 836 S.W.2d at 409. This allows for the Chief Justice to appoint a replacement at any point in which it is deemed necessary.

Only a majority of a collective body is empowered to act for the body. See *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) quoting *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967). The affirmation by default of Anthony's conviction by the equally divided Court does not constitute an opinion of the court. Ky. Const. §110(3); see also *Sprint Nextel Corp.*, 508 F.3d at 1131 ("The deadlocked vote cannot be considered an order of the Commission nor can it constitute agency action.").

Anthony has been denied his constitutional right to have an adjudication on his claims of errors by the trial court. The upholding of his conviction was not done through a quorum of the collective body required to be empower to act for the body. By the action or inaction of the

supreme court Anthony's conviction is considered to be upheld by the same trial court that entered the conviction. Consequently Anthony has yet to receive a final decision of his guilt or innocence. Three Justices of the Kentucky Supreme Court were of the opinion that his conviction was not obtained through a lawful process. Anthony is owed an appeal which is adequate and effective.

Anthony respectfully requests this Honorable Court to make a ruling on the merits of his claims of error, or alternatively remand to Kentucky with instructions to for him to receive an appeal conforming with the demands of due process required by the Fourteenth Amendment.

Argument II: The trial court's failure to abide by the findings of the higher appellate courts and granting the Commonwealth extraordinary discovery fundamentally abridged Anthony of his right to present a complete defense and interfered with counsel's ability to make strategic decisions.

At his second trial as part of his alternative perpetrator defense Anthony "attempted to offer several potentially inculpatory statements Mr. Hafer had made to federal agents, but they were excluded." *Gray v. Commonwealth*, 480 S.W.3d 253, 266 (Ky. 2016) (*Gray I*, appendix E). In addition "the trial court excluded other statements from several other witnesses relating to Mr. Hafer's involvement with the Grays." *Id.* During appellate review the court found:

It is undisputed that evidence tends to show that Hafer had motive to commit the crime and that this motive was established at trial. No doubt, a stated intention to rob the Grays and kill them in their home is sufficient evidence of motive to satisfy the first prong of the Beaty aaltperp test. But the trial court was not satisfied with Gray's proffer of evidence to support a finding of Hafer's opportunity to commit the murders. Hafer's alleged opportunity was considered too speculative to be presented to the jury. But we hold that this conclusion was misplaced.

Gray I, 480 S.W.3d at 267.

After setting forth the applicable standard the court found **"we think Gray has more than enough probative information under this standard to warrant admission of his aaltperp evidence."** *Id.*, at 268. Based on the avowal testimony preserved in the record the court concluded its discussion by stating:

We do not know Hafer's account of his movements during that two-day span because he invoked his right against self-incrimination. Without any information from Hafer, we cannot know whether he had an alibi during that 36-48 hour period. Nevertheless, we are faced with nearly two days of time when the crime could have been committed and an aaltperp with a motive to have played a role in the Grays' deaths. **Gray's right to present a complete defense at trial was impaired by the trial court's exclusion of his aaltperp evidence.**

Gray I, 480 S.W.3d at 268.

Prior to Anthony's third trial the prosecution moved the trial court to hold hearings to question the aaltperp witness as to when and where the hearsay statements were made, and what the specific hearsay statement were and who was present when the statements were made. (See Appendix B – 13). Defense counsel objected protesting that the prosecution had the opportunity to cross-examine the witness during the avowal testimony conducted at the previous trial or pursued through investigation. (See Appendix B – 14). Further, counsel reminded the trial court that on appeal the states highest court had ruled Anthony had provided more than sufficient information to have the aaltperp evidence admitted at trial. (*Id.*). Counsel continued to explain the prosecution was not to be afforded extraordinary discovery by having the witness testify under oath to investigatory questions. (See Appendix B – 16). See also *Hillard v. Commonwealth*, 158 S.W.3d 758, 764-65 (Ky. 2005) ("the government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government

attorneys.” quoting *United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993)). Nevertheless the court granted the prosecution's motion and set the matter for a hearing. Before the start of the hearing counsel once again objected. After requesting leave to file a writ of prohibition, begrudgingly counsel agreed to a limited hearing while noting their continuing objections. (See Appendix B – 16).

After the hearing the prosecution continued to request discovery of the aaltperp information. The trial court entered an order requiring both parties to provide opposing counsel all aaltperp statements. (See Appendix B – 18). Believing the discovery may assist the court to make determinations regarding the accuracy, reliability and admissibility of aaltperp evidence for use at trial. (Id.). By entering the order the trial court placed its own authority above that of the state supreme court, which found Gray presented more the enough information. See *Gray I*, 480 S.W.3d at 268.

Counsel sought a writ of prohibition against the enforcement of the order by trial court. The court of appeals granted the writ in part thereby exempting the defense from having to turn over transcripts or audio recording of the witness interviews. (See Appendix B – 18-19). In granting the writ the court found the defense would suffer irreparable harm recognizing that once the information is furnished it cannot be recalled. (See Appendix B – 20). Irrespective of the directions in the writ, the trial court required counsel to turn over further aaltperp evidence. Counsel relented and released the evidence for an in camera review only to avoid legal wrangling and keep the upcoming trial date. (See Appendix B – 19).

By granting the prosecution's request for a hearing and then entering an order for further discovery the court exhibited a blatant disregard for the law of the case and binding precedent as

discussed in *Gray I. Id.*, 480 S.W.3d at 268. The "only authorized purpose [for a deposition] is to preserve evidence, not to afford discovery." *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993) quoting *Simon v. United States*, 644 F.2d 490, 498 n.12 (5th Cir. May 7, 1981). When presented on review of the use of a deposition in a criminal case the First Circuit found:

We must decide whether this case presented exceptional circumstances and whether taking the deposition was in the interest of justice. In reviewing the district court's decision we bear in mind that the language of the rule [Fed.R.Crim.P. 15] and prior case authority commit the decision to the discretion of the district court. E. g., *United States v. Rosenstein*, 474 F.2d 705, 715 (2nd Cir. 1973); *United States v. Puchi*, 441 F.2d 697, 701 (9th Cir. 1971). But the language of the rule [Fed.R.Crim.P. 15] suggests that the discretion is not broad and should be exercised carefully. Allowing depositions too freely would create the risks that parties would seek to use depositions as a discovery device in criminal cases, See, e. g., *In re United States*, 348 F.2d 624 (1st Cir. 1965), or would try to use depositions in lieu of live testimony at trial in contravention of the spirit of the Sixth Amendment, *Barber v. Page*, 390 U.S. 719, 721 (1968). Our review of all the circumstances leads us to conclude that the court abused its discretion by granting the government's motion to depose.

United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978).

The trial court's granting the hearing and non-authorized discovery impeded counsel's ability to adequately represent and defend Anthony. Defense counsel must be able to perform his/her necessary duties without intrusion by the prosecutor. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). These duties consist of "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" best described as attorney work product. *Id.*, 329 U.S., at 511. "Were such materials open to opposing counsel "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*

"Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes[.]" *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981). Discussing *Hickman* the Court drew special attention to the need for safeguarding attorney work product and when ordering discovery "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney." *Upjohn Co.*, 449 U.S., at 400.

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.

* * * *

Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.

United States v. Nobles, 422 U.S. 225, 238-39 (1975),

The state violates a defendant's right to the effective assistance of counsel when it obstructs the ability of counsel to make independent decisions about how to conduct the defense. *Perry v. Leeke*, 488 U.S. 272, 279-80 (1989). In *Brooks v. Tennessee*, the Court held the requirement that the defendant was to be the first defense witness to testify interfered with counsel's ability to make important tactical decisions. *Id.*, 406 U.S. 605, 612-613 (1972). The government's interference deprived the defendant of the guiding hand of counsel in the timing of this critical element of his defense. *Id.*

The Government breaches constitutional limitations by using its "powers so as to hamper a criminal defendant's preparation for trial." *California v. Trombetta*, 467 U.S. 479, 486 (1984). By forcing defense witnesses to testify under oath and prior to trial, the prosecution through court order interfered with the presentation of a complete unabridged defense and counsel's

ability to make tactical decisions about how to conduct the defense as the case progressed. In the end Anthony did present an abridged aaltperp defense, but suffered undue harm when he was forced to divulge his defense prior to trial. Because of the inordinate encroachment by the prosecution and the trial court Anthony did not receive the trial he was entitled to. The government denied him the basic protection of his ability to present a complete defense. In so doing Anthony was deprived of basic protections necessary for the trial to be regarded as fundamentally fair and function as a reliable determination of guilt or innocence. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

It is well known that most constitutional errors can be reviewed under harmless-error standard. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Nonetheless some errors are not subject to the harmless-error standard and have become to be known as structural errors. *Weaver v. Massachusetts*, 582 U.S. 286, 295-96 (2017). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. *Weaver*, 582 U.S., at 294-95. The defining nature of a structural error is that it affects the framework of trials, rather than an error which occurs amidst the trial itself. *Id.*

By interfering with Anthony's right to present a complete defense rather than excluding all aaltperp evidence resulted in error to the framework of his trial. The difference is that an evidentiary error ruling is typically made on the exclusion or inclusion of evidence. Such was the case in *Crane v. Kentucky*, 476 U.S. 683 (1986). In *Crane* the trial court excluded all evidence regarding the circumstances under which the confession was given. *Id.*, 476 U.S., at 686. This was an evidentiary ruling that did not affect the overall framework of the trial. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006).

More similar but still distinguishable is the case of *Holmes v. South Carolina*, 547 U.S. 319 (2006). Both Anthony and Holmes tried to present an aaltperp or third party guilt as part of their defense. That is where the similarity ends. The third party evidence of guilt that Holmes wanted to present was excluded in whole based on a state evidentiary rule and subject to harmless error analysis. Anthony's case is easily distinguishable because unlike Holmes, he was able to present a partial aaltpeerp defense. See *Gray I*, 480 S.W.3d at 268 ("Gray's right to present a complete defense at trial was impaired by the trial court's exclusion of his aaltperp evidence."). His right to present a complete defense was hampered by the court's order by granting extraordinary discovery thereby exposing the defense's aaltprep strategy to the prosecution. The court's order provided the prosecution with pretrial testimony as discovery and counsel's notes for those witnesses that did not testify. When the error infects the whole of the defense's case in chief as well as opening and closing arguments structural error has occurred.

In *Weaver* the Court identified three broad categories that structural errors generally fit into:

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant. That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error.

Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise effect of the violation cannot be ascertained. Because the government will, as a result, find it almost impossible to show that

the error was harmless beyond a reasonable doubt, the efficiency costs of letting the government try to make the showing are unjustified.

Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. It therefore would be futile for the government to try to show harmlessness.

Weaver, 582 U.S., at 295-96 (citations and quotations omitted).

The court's order and the prosecution's intrusion into Anthony's preparation for trial amounts to structural error under the first two categories detailed in *Weaver*. It is the right of every defendant to prepare and present his case free from governmental interference and exposing his strategy to the prosecution prior to trial. The right to present the defense of one's own choice goes far beyond the harm suffered by Anthony and is an intrinsic right to all defendants. Because Anthony's claim of error fits into the first category he is entitled to automatic reversal without a need to show harm or prejudice.

The second category is also applicable to the error that affected Anthony's trial. The harm or prejudice attributed to this error cannot be quantified or analyzed. Reversal to errors in this category are automatic because the cost of litigating the harm or injustice is unjustifiable. Describing the affect the release of the witness statements the Kentucky Court of Appeals found the defense would suffer irreparable harm because once the information is furnished it cannot be recalled. (See Appendix B – 20).

The Government abuses its powers when a criminal defendant's preparation for trial is interfered with. Despite the Kentucky Supreme Court making the admission of Anthony's aaltprep evidence the law of the case, the trial court allowed the prosecution to relitigate the

admissibility of Anthony's aaltprep defense. In doing so the prosecution was allowed to use a pretrial hearing for discovery purposed. Because of the hearing and trial court order to turn over aaltprep witness statements including counsel's work product, the prosecution was able to preview the defense's strategy before going to trial. The court of appeals agree with counsel that the trial court's allowing the prosecution access to the asltprep evidence was an abuse of power and granted a writ of prohibition. Unfortunately the writ was issued to late. By the time the writ was issued most of the asltprep evidence was in the prosecution's hands. Be grudgingly counsel had released most of the aaltprep evidence in order to keep the set trial date. At that point Anthony had been in Jail for over nine (9) years. The intrusion of the prosecution into the defense strategy to be used at Anthony's third trial was not a minor infraction. The prosecution's actions affected the aaltprep defense and counsel's ability to make independent strategic decisions during trial proceedings. The encroachment by the prosecution affect the defense from voire dire to closing statements, i.e. structural error warranting reversing Anthony's murder convictions.

CONCLUSION

The value of having one's day in court depends entirely on what the defendant may do with it. The Kentucky Supreme Court denied Anthony of his day in court. Neither side of the evenly split court (3 to 3) rendered factual findings or application of law. In his direct appeal Anthony asserted occurred making his entire trial fundamentally flawed. A trial is a procedurally balanced proceeding in which the parties face no disparate structural barriers in presenting their respective cases to the decision-maker. The intrusion into the defense's strategy for trial excluded the possibility of a fundamentally fair trial capable of functioning as a reliable determination of

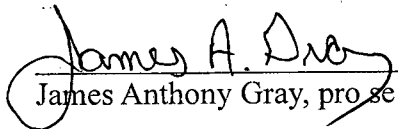
guilt or innocence.

Three (3) of the Justices found Anthony was not convicted by lawful means. The failure to have an appellate review will result in manifest injustice - allowing an innocent man serving time in prison.

WHEREFORE, James Anthony respectfully requests this Honorable Court to grant his petition for certiorari so that he is able to have a direct review of trial court errors. In the alternative, Antony requests this Court to enter an order remanding the case back to the Commonwealth of Kentucky with instructions to either reinstate his appeal with a requirement that 7 Justices make up the court or if he is not retried with 180 days he is to be set free.

Mr. Gray's petition for a writ of certiorari should be granted to allow for briefing.

Respectfully Submitted,


James Anthony Gray, pro se

Date: November 19th, 2024.