

No. _____

IN THE
Supreme Court of the United States

Patricia Ragland McGehee and Richard McGehee.
Pro Se Petitioners,
v.

Commonwealth of Kentucky, Transportation
Cabinet, Department of Highways Respondent,

On Petition for a Writ of Certiorari to the
Commonwealth of Kentucky Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Patricia Ragland McGehee
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QUESTIONS PRESENTED

Mootness is a powerful but unacceptable tactic to evade federal requirements. In 1987 the Kentucky Transportation Cabinet studied extending Ring Road from US 62 to Western Kentucky Parkway and on to create an interchange with I-65. This four-mile extension requires federal approvals. Road construction started before the trial began for right-of-way of parcel 12 owned by Pat Ragland. Hardin Circuit Court, with conflicts of interests, prevented deposing witnesses needed for a fair trial guaranteed by the Fourteenth Amendment. The Kentucky Transportation Cabinet used threats to bulldoze Pat Ragland's cherished historic home to obtain a settlement agreement to evade federal resolution on the merits. Now construction has been completed on Pat Ragland's historic property in a wellhead protection area without the required federal analysis to avoid or minimize adverse impacts. The Ninth Circuit found construction can be removed where federal requirements have been evaded but Kentucky Court of Appeals says no relief exists.

1. Whether construction moots legal issues thereby evading federal requirements?
2. Whether Hardin Circuit Court could enforce Kentucky Transportation Cabinet's proposed Settlement Agreement and Mutual Release from our U.S. District Court case?
3. Whether denial of a fair trial guaranteed by the Fifth and Fourteenth Amendment is a structural violation of due process subject to reversal?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patricia Ragland McGehee and Richard McGehee respectfully petition for a writ of certiorari to review the judgment of the Commonwealth of Kentucky Court of Appeals.

OPINIONS BELOW

The Commonwealth of Kentucky Court of Appeals Order Affirming (App. 1a – 11a)¹ is unpublished.

JURISDICTION

The Commonwealth of Kentucky Court of Appeals entered its Order Affirming on March 24, 2017 (App. 1a – 11a). A motion for discretionary review to the Kentucky Supreme Court was denied on August 16, 2017 (App. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706 provides in relevant part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of

¹ The appendix to this petition is cited as "App."

an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; . . .

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: “. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law;”

Section 1 of the Fourteenth Amendment provides in relevant part: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law;”

STATEMENT

I. Ragland's Historic Farm

On April 25, 1863 Mary Elizabeth (May) Arnold inherited this farm from division of her father's Richard May estate. She sold this farm to finance Philip and Mary Arnold's ventures out west which became known as the Great Diamond Hoax of 1872². Upon returning to Kentucky this farm was the first she purchased. On November 23, 1927 Fannie Harrison purchased this same farm. The 1940 census shows Pat's parents Irvin and Minerva Ragland living and working on the farm with Fannie Harrison. As a widow woman Fannie Harrison with the help of her nephew Irvin Ragland and his young bride Minerva successfully ran this farm through the Depression Era. The September 11, 2006 *National Register Eligibility Study of Ragland Farm, Gaithers Station Road, Hardin County, Kentucky* (App. 79a - 80a) cited the intact complex of improvements and spatial organization represent efficiency necessary for a family farm to be successful through declining economics of the depression. Historic resource authorities of the United States Department of Interior entered the Fannie Harrison Farm on the National Register of Historic Places on February 7, 2008 as National Register Information System ID 08000005³. Since the period of significance is 1920 to 1950 (App. 80a) the farm was eligible for the register

² Robert Wilson, *The Great Diamond Hoax of 1872*, Smithsonian Magazine Online (2004).

<http://www.smithsonianmag.com/history/the-great-diamond-hoax-of-1872-2630188/>

³ <http://npgallery.nps.gov/nrhp/AssetDetail?assetID=ae852311-8c67-4d92-ae25-e06d4be1060e>

long before the road design was shifted onto the Ragland farm in 2002 (App. 104a).

In 1991 Irvin Ragland conveyed this farm to his daughter Pat Ragland for love and affection (App. 81a - 85a). Since Kentucky is not a community property state, she remains sole owner according to KY Rev Stat § 404.010(1) even though she married Richard McGehee in 1993. It is the Ragland family farm that has protective status as an historic property.

II. The Wellhead Protection Area

Extent of the wellhead protection area for the karst sensitive Dyers Spring (Gaithers Station Spring) was determined by U.S. Geological Survey and Kentucky Division of Water as reported in 1997⁴ (App. 86a – 87a and 109a) to aid water-supply managers.

III. The Ring Road Extension Project

Kentucky Transportation Cabinet's (KYTC's) November 1987 study Ring Road Extension, Hardin County identifies the purpose is "to open the undeveloped area to development both industrial and residential." (App. 88a). This project consists of Section 1 from US 62 a length of 1.80 miles to create a diamond interchange with Western Kentucky

⁴ Charles J. Taylor, *Delineation of Ground-Water Basins and Recharge Areas for Municipal Water-Supply Springs in a Karst Aquifer System in the Elizabethtown Area, Northern Kentucky*. U.S. Geological Survey Water-Resources Investigations Report 96-4254, pp. 1, 3 (1997), <http://pubs.usgs.gov/wri/1996/4254/report.pdf>

Parkway and Section 2 from Western Kentucky Parkway 2.08 miles to create an interchange with Interstate 65 (I-65) and an intersection with US 31W as shown in its Exhibit 3 (App. 89a, 90a, and 93a). It requires relocation of the weigh station on I-65 (App. 90a). Based on traffic forecasts the logical eastern terminus is US 31W (App. 90a - 92a).

After KYTC decided the location of Section 1, they consulted Kentucky Division of Water's Joseph Ray on February 13, 2004 about their proposed Best Management Practices structures for wellhead protection. Ray identified problems (App. 117 - 120a) that runoff contaminants discharged into karst depressions will rapidly reach the water-supply spring, the project site has high potential for collapse, and runoff should not be emptied into Gaithers Karst Window (App. 121a). The National Cooperative Highway Research Program⁵ has warned not having enough information about affected environment leads to failure:

Failure can be expected when the level of engineering greatly exceeds the level of environmental analysis or vice versa. For example, not having enough information about the affected environment while advancing a design concept can lead to the discovery of a deal-breaker late in the process and the need to go back and search for another alternative.

⁵ Timothy R Neuman, et al. *A Guide to Best Practices for Achieving Context Sensitive Solutions* 41 (2002).

On December 13, 2005 KYTC issued Official Order 103359 (App. 94a - 95a) authorizing acquisition of Right of Way for Ring Road Extension project Section 1 from US 62 to Western Kentucky Parkway as Item No. 4-7010.00.

On June 27, 2006 U.S. Army Corps of Engineers authorized Nationwide Permit 14 coverage for the five stream crossings of the Ring Road Extension project Item No. 4-7010.00 between US 62 and Western Kentucky Parkway (App. 99a – 102a).

On July 27, 2007, months before the bench trial for right-of-way started December 14, 2007, KYTC "let" construction contract 071144 for a 1.46-mile construction segment Item No. 4-7010.10 (App. 105a - 107a) from US 62 to Gaither Station Road. Building this four-lane divided roadway segment to end as an elevated mound for a bridge to go over Gaither Station Road and CSX Railroad compels building the other segment that takes out frontage of the historic Ragland farm (App. 108a). See explanation of logical termini in 23 C.F.R. 771.111(f):

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

IV. The History of Court Actions

Eminent domain proceedings are governed by Kentucky Rules of Civil Procedure according to KY Rev Stat 416.650. The Ky. R. Civ. P. 26.02(4)(a) provides a party to depose expert witnesses *after* they have been identified in answer to interrogatories including "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion". Since KYTC refused to answer (ROA Vol. IV, pp. 468-484)⁶ these straight forward questions, Judge Coleman on November 13, 2007 verbally ordered that on November 27, 2007 she would go over each unanswered interrogatory in a hearing one by one to allow our Hon. Graddy to have the answers needed to prepare for trial (VR 11/13/2007 @ 9:54:00 - 9:56:45)⁷. On November 19, 2007 in KYTC's District 4 office Hon. Graddy

⁶ Hardin Circuit Court Civil Action No. 06-CI-01508 Record on Appeal is cited as "ROA".

⁷ Hardin Circuit Court Trial video record is cited as "VR".

discovered the U.S. Army Corps of Engineers Nationwide 14 permit for the 5 stream crossings spread out through the first 1.8-mile section of Ring Road Extension (App. 99a -102a). He also discovered a sequence of KYTC emails (App. 104a) revealing the "ability of Mrs. Ragland to relocate and sell the remainder of her farm (located next to the CSX railroad and Western Kentucky Parkway and now would front the proposed extension) to the E-town Industrial Foundation" was a factor to shift the Ring Road Extension design onto the Ragland farm. Eight days later Hon. Ken Howard became a judge and took over this case from Judge Coleman without disclosing being on the Board of Directors of the Elizabethtown Industrial Foundation. Contrary to the order of Judge Coleman, who had presided over motion practices since the August 21, 2006 petition, Judge Howard on November 27, 2007 did not go over the unanswered interrogatories. Instead on November 30, 2007 Judge Howard overruled (App. 32a - 35a) Hon. Graddy's motion to compel because Judge Howard claimed the revised interrogatories and subparts exceeded thirty allowed by Ky. R. Civ. P. 33.01 thus constituted an undue burden. On December 4, 2007 Hon. Graddy responded:

I would like to be able, also, in light of the Court's ruling on our motion to compel. Court apparently agrees with Mr. Dean that when I ask give me the facts and law that is the basis for your position on this, that is a two-part answer. I did that seventeen times, or eighteen times, and so the Court has found that exceeds the thirty numbers. I would like to eliminate five of those

questions and submit twenty-eight interrogatories asking what are the facts and laws that are the basis for their position which I think I am entitled to do. I obviously can't do that if we have a trial on the 14th. I thought we were entitled to answer if the court has ruled I exceeded my number. And to me the right response is to cure that by reducing the number to an amount that the court determines appropriate and not harassment to the Transportation Cabinet and let me serve interrogatories that are non-harassing on the Cabinet and get answers and I would like to do that before trial and a continuance would give me the opportunity to do that. (VR 12/04/2007 @ 9:46:10 - 9:47:30)

This Supreme Court rejects "that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," *Conley v. Gibson*, 355 U. S. 41, 48 (1957).

Hon. Graddy needed witness depositions (VR 11/27/2007 @ 10:05:12 - 10:05:32 and VR 12/04/2007 @ 9:53:00-9:53:30) and production of documents from KYTC staff and non-party witnesses such as environmental experts, Kentucky Division of Water, U.S. Army Corps of Engineers, and Elizabethtown Industrial Foundation regarding results of the November 19, 2007 file review. However, by Ky. R. Civ. P. 34.02(2) a deponent has 30 days to respond to a request for production of documents. Therefore, on

November 30, 2007 Hon. Graddy filed Amended Motion to Reschedule Bench Trial and Re-Notice (ROA Vol. IV, pp. 560 - 564). Nevertheless, on December 6, 2007 Judge Howard signed an order (App. 29a - 31a) overruling the amended motion to reschedule the bench trial.

On December 6, 2007 Hon. Graddy discovered environmental files in KYTC's Frankfort office that had not been made available in KYTC's District 4 office (November 20, 2007 Deposition of Gary Valentine, P.E. pp. 49 - 51, 125, 128 - 131). Since the Fifth and Fourteenth Amendments to the United States Constitution guarantee due process for a fair trial Hon. Graddy again objected to lack of discovery when the trial started Friday, December 14, 2007:

But, and that is essentially one week before trial I was allowed to see what was represented to be the complete file. And ten days before trial I got a witness list from Plaintiff, that sort of delay in providing me with a discovery response, to an effort I began formally in May and getting the documents a week before trial and getting a witness list ten days before trial is a denial of due process. That is not fair to me and my clients when we are trying to prepare our case, take discovery and frankly to defend our home and that is what this case is about. We are trying to defend our home. And we have a right to a fair process and the civil rules provide us with an opportunity to take discovery in order to prepare for trial. We have been

denied that opportunity and while forthwith I think is a guide to the court and the parties, it does not suspend the rules of civil procedure and the right to due process and the right in any court in Kentucky to have a fair opportunity to prepare for a trial where the rights are, what's at stake is incredibly coveted, a person's home and we have been denied that right. Again it is easily curable. If the court would grant my first motion and order proper service we would be, we would have within that period the opportunity to complete our discovery get answers to questions we still do not have answers to. There are documents we saw for the first time last Thursday, I don't know what they mean, I have not had a chance to depose their author and I have not had a chance to follow up and figure out what these documents mean. And that kind of allowing a litigant, a Plaintiff no less, to bring a demand to take my clients property and then withhold from me, their attorney, documents and identity of witnesses until a week before trial is not fair. (VR 12/14/2007 @ 9:15:03 - 9:17:27)

Nevertheless, Judge Howard again ruled against rescheduling the trial but acknowledged the objection was preserved for the record:

I think the factual and legal basis that is being presented here today is the same as what I ruled on previously by

order of this court on December 6th, so we will stand on that order but it is preserved for the record Mr. Graddy. (VR 12/14/2007 @ 9:21:36 - 9:21:49)

Since Judge Howard had not disqualified himself, Hon. Graddy asked him to recuse due to conflict of interest of having been Hardin County Attorney (VR 12/14/2007 @ 9:22:00 - 9:24:00). Judge Howard believed his serving as County Attorney since 1989 was no need to recuse (VR 12/14/2007 @ 9:25:43 - 9:27:49). Hon. Graddy stated the need for an injunction to stop the construction (VR 12/14/2007 @ 10:00:58 - 10:01:14). However, when Hon. Graddy mentioned KYTC's email about the Elizabethtown Industrial Foundation (App. 104a), Judge Howard disclosed being on the Board of Directors of the Elizabethtown Industrial Foundation. Judge Howard said as part of due diligence he checked with the Executive Director of the Elizabethtown Industrial Foundation that there had not been communication with owners of a McGehee farm as the name on the case file but did not check about a Ragland farm (VR 12/14/2007 @ 10:11:51 - 10:20:00). Judge Howard had to recuse due to being on the Board of Directors of the Elizabethtown Industrial Foundation but nevertheless ordered the bench trial would proceed that day with Judge Coleman (VR 12/14/2007 @ 10:41:04 - 10:41:34).

On Monday, December 17, 2007 Hon. Graddy again reminded Hardin Circuit Court it was proceeding under protest:

Now we are here under my protest, I still have not had the right to take

discovery because I saw documents for the first time in this case a week before trial. And I got a list of witnesses tendered for trial. This was one of my motions to postpone that Judge Howard ruled on before I announced for ready. As I sit on the case and went forward under that protest that I would like to have done more discovery to find out more about why these things happened. (VR 12/17/2007 @ 3:29:00 - 3:29:37)

Hon. Graddy again stated the need for an injunction to require KYTC to get off the property but Judge Coleman said if she finds right to condemn then it would be a matter for damages and if she finds no right to condemn then there will be adequate remedies later (VR 12/18/2007 @ 11:48:41 - 11:50:54).

On February 29, 2008 Hon. Graddy objected KYTC attempts to moot judicial review by constructing the first segment to the illogical termini of Gaither Station Road in Defendants' Post Trial Memorandum (ROA Vol. V, pp. 742 - 743):

This is an absurd action by the Cabinet.
No one needs a Ring Road Extension to
Gaither Station Road.

...

The actions by the Cabinet to advance a portion of this project while the matter in before the courts is a clear attempt by the Cabinet to moot the judicial review process. If these actions do not amount

to fraud, they are clearly actions taken in bad faith.

Since Hardin Circuit Court would not consider an injunction, Hon. Graddy on April 2, 2008 filed Complaint and Petition for Declaration of Rights in Franklin Circuit Court Civil Action No. 08-CI-608 (ROA Vol. IX, pp. 1282 – 1311) for an injunction to halt construction as being in violation of Kentucky Model Procurement Code. Franklin Court found it lacked jurisdiction.

Hardin Circuit Court's June 2, 2008 Interlocutory Order and Judgment (IOJ) (App. 23a - 28a) items 1, 2, and 3 provided KYTC may take possession upon payment and that the Master Commissioner shall convey fee simple title of Parcel 12 to KYTC. However, McGehees by KY Rev Stat 416.620(2) appealed the IOJ and by KY Rev Stat 416.620(1) filed exceptions to the award. But after Supreme Court of Kentucky's October 13, 2010 denial of discretionary review (ROA Vol. VIII, p. 1101) regarding the IOJ, the KYTC did not have the Master Commissioner to transfer title. Instead KYTC sent a November 1, 2010 letter stating, "If you would like to negotiate the relocation of the house or other buildings, it will need to be part of a global settlement of damages for the taking." (App. 110a - 111a). This holding the cherished historic house and buildings as bargaining chips for a global settlement ignores KYTC's 2006 appraisal had already determined the landowner could retain improvements as "salvage value of the residence - \$1,000, other improvements -0-" (Hardin Trial Defendant's Exhibit 33, page 1, item 15). KYTC's global settlement (App. 45a – 52a) prevents

resolution on the merits thereby protecting KYTC and federal agencies from violations of federal requirements.

On March 15, 2011 our Hon. Graddy filed Complaint for Declaratory and Injunctive Relief to initiate Case 3:11-cv-00160-JGH in U.S. District Court⁸ against U.S. Army Corps of Engineers, Federal Highway Administration, and KYTC for failure to implement federal protective laws to avoid or minimize adverse impacts. The Administrative Procedure Act 5 USC 706(2)(A) makes such violations subject to scope of judicial review to set aside agency action. Nevertheless, on July 19, 2011 without having discovery U.S. District Court denied our injunction. Subsequently, on July 29, 2011 KYTC posted (App. 112a) their August 19, 2011 schedule to "let" construction for the remainder of the Ring Road Extension to Western Kentucky Parkway. Therefore, we had to relocate some of the historic Ragland farmstead's smaller buildings and windmill on August 9, 2011 to save them from demolition by KYTC. On August 18, 2011 we signed a contract for movers to move the Fannie Harrison house that was Pat's home for 59 years. On August 19, 2011 KYTC did "let" the construction contract (App. 113a) still without title to Parcel 12 of Pat Ragland's farm. KYTC objected to our relocating buildings without their global settlement. On August 30, 2011 Hon. Graddy filed Motion for Court-Sponsored Mediation and Stay of Acts to Evict or Demolish Through Such Mediation for alternative resolution in U.S. District

⁸ U.S. District Court for the Western District of Kentucky, hereinafter U.S. District Court.

Court pursuant to LR 16.2⁹. However, the alternative resolution meeting on September 6, 2011 presented the ultimatum to accept \$400,000 or your home will be bulldozed tomorrow (ROA Vol. IX, p. 1354). On October 6, 2011 KYTC filed Defendant Transportation Cabinet's Motion to Enforce Settlement Agreement and/or Notice of Intent to Evict in U.S. District Court stating "Plaintiffs have never agreed to the terms of the agreement or signed same" and "However, without a settlement agreement, the Plaintiffs have no right to be upon the premises or claim to the improvements whatsoever." U.S. District Court's October 7, 2011 Order states, "The agreement constitutes a mutual protection and benefit for all parties" and it was "valid and enforceable" but never did enforce it. By October 12, 2011 we were displaced, we had the historic home and all the historic farm buildings out of the proposed right-of-way but we still had to sign KYTC's proposed Settlement Agreement and Mutual Release on October 13, 2011 (App. 45a – 52a) to have title to the buildings (ROA Vol. IX, p. 1360). Since U.S. District Court did not enforce it, KYTC filed a motion in Hardin Circuit Court on December 28, 2011 (ROA Vol. IX, pp. 1337 - 1349) for a Master Commissioner deed as enforcement of KYTC's proposed Settlement Agreement and Mutual Release from our U.S. District Court case.

We hired Hon. Bryan Bennett on December 1, 2011 (App. 114a) to remove Hon. Graddy from U.S. District Court and Hardin Circuit Court. Hon.

⁹ Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky are cited as "LR".

Bennett entered Hardin Circuit Court on January 3, 2012 with Response to Motion for Deed (ROA Vol. IX, pp. 1353-1401) objecting Hardin Circuit Court could not enforce KYTC's proposed Settlement Agreement and Mutual Release from our U.S. District Court action because we would challenge it in U.S. District Court:

Defendants . . . object to the motion for a Commissioner's Deed and motion for Attorney Fees. The Defendants were under duress at the time of the mediation that led to the settlement and are challenging the Settlement Agreement that was approved in The Federal District Court. . . . The Defendants objections to the settlement agreement are discussed in more detail in an affidavit prepared by and executed by Richard McGehee for the Federal District Court Action, which is attached hereto as Exhibit No. 1.

In U.S. District Court the Defendant Transportation Cabinet's Motion to Dismiss as Settled, entered January 4, 2012, (App. 53a - 55a) informed U.S. District Court of McGehees intent to challenge KYTC's proposed Settlement Agreement and Mutual Release by defense of duress but simultaneously asks that McGehees' federal case, against three defendants, be dismissed as settled:

The Plaintiffs have apparently discharged their counsel herein, although there has been no formal substitution of counsel. However, Hon.

Bryan E. Bennett entered his appearance in Hardin Circuit Court, Civil Action No. 06-CI-01508, and advised the undersigned counsel that he would be representing the Plaintiffs in the above-styled action as well.

... This motion is necessitated by the refusal or failure of the Plaintiffs to cooperate or otherwise comply with the terms of the settlement agreement. The Plaintiffs herein have further filed a response alleging that such Plaintiffs were under "duress at the time of the mediation that led to the settlement and are challenging the Settlement Agreement that was approved in The Federal District Court." However, no such motion or other pleading has been filed by Plaintiffs herein.

WHEREFORE, the Defendant Transportation Cabinet states that there are no further issues herein, and it is appropriate to dismiss this action, with prejudice as settled, each party to bear its own costs and attorneys' fees.

Nevertheless, Hardin Circuit Court's Order entered January 9, 2012 (App. 13a – 15a) states "the Court finds that the settlement agreement between the parties as adopted by the United States District Court, Western District of Kentucky, Civil Action No. 3:11CV, is enforceable herein," and "Plaintiff shall pay to the Clerk of this Court settlement proceeds of \$400,000.00" and if Defendants do not deliver a deed

to Plaintiff within 7 days of this payment the Master Commissioner shall deliver the deed.

U.S. District Court dismissed our Civil Case No. 3:11-cv-00160-JGH by Order of Dismissal (App. 56a - 57a) entered January 9, 2012 just five days after KYTC's motion to dismiss. This Order of Dismissal tendered by defendant KYTC incorrectly states "Plaintiff having moved the Court to dismiss this action with prejudice, as settled" as if it was Plaintiff McGehees' dismissal by court order under Fed. R. Civ. P. 41(a)(2).

On February 3, 2012 Hon. Bennett entered U.S. District Court appealing the January 9, 2012 Order of Dismissal as violating LR 7.1(c) that allows a party opposing a motion to "file a response memorandum within twenty-one (21) days of service of the motion". This appeal to 6th Circuit was to reopen our U.S. District Court case so we could challenge KYTC's proposed Settlement Agreement and Mutual Release by defense of duress in order to continue seeking Federal environmental and historic protections. Also on February 3, 2012 we entered a state Notice of Appeal (ROA Vol. X, pp. 1478 - 1481) of Hardin Circuit Court's January 9, 2012 Order. By *Johnson v. Com.*, 17 S.W.3d 109 (Ky. 2000) our February 3, 2012 appeals took jurisdiction from Hardin Circuit Court.

Hardin Circuit Court's Order entered February 6, 2012 (App. 16a - 18a) states again "the Court finds that the settlement agreement between the parties as adopted by the United States District Court, Western District of Kentucky, Civil Action No. 3:11CV, is enforceable herein," and "Plaintiff shall

pay to the Clerk of this Court settlement proceeds of \$400,000.00” and if Defendants do not deliver a deed to Plaintiff within 7 days of this payment the Master Commissioner shall deliver the deed.

On February 6, 2012 Hardin Circuit Court also entered Findings of Fact, Conclusions of Law and Order (App. 19a - 22a) finding our Response to Motion for Deed with Richard McGehee’s affidavit attached (ROA Vol. IX, pp. 1353-1401) was grounds for CR 11 sanction:

When the long history of this matter is studied and the most recent filing is viewed in that light, it cannot be seen as anything but a further effort to delay and to harass the opposing party, and the court so finds.

On February 13, 2012 the first and only Master Commissioner's Deed (App. 38a - 44a) for Hardin Circuit Court Civil Action No. 06-CI-01508 was signed by Judge Kelly Mark Easton as enforcement of KYTC's proposed Settlement Agreement and Mutual Release.

On February 24, 2012 we entered another state Notice of Appeal (ROA Vol. X, pp. 1490 - 1500) for the January 9, 2012 Order, the February 6, 2012 Order and the February 6, 2012 Findings of Fact, Conclusions of Law and Order. On May 31, 2012 Hon. Bennett filed a Lis Pendens in Lis Pendens Book 126 Pages 1347 - 1349¹⁰ putting the public on

¹⁰ Available from
<http://www.hccoky.org/eSearch/LandRecords/protected/SrchBookPage.aspx>

notice property of Hardin Circuit Court Civil Action No. 06-CI-01508 is not a settled issue.

We hired Hon. Robin Slater on May 8, 2013 to remove Hon. Bennett. We provided strategies and information to her for our appeal of Hardin Circuit Court. However, we fired Hon. Slater on September 7, 2013 and have proceeded without legal counsel ever since. Hon. Slater did not prepare a brief for us to review or approve. Her brief was not prepared in consultation with us and did not incorporate strategies and information we had provided, see *Strickland v. Washington*, 466 U. S. 668, 688, 691 (1984), (Counsel's duty to consult with defendant on important decisions and to act on informed strategic choices made by defendant and on information supplied by defendant.). On April 8, 2014 Kentucky Court of Appeals denied (App. 36a - 37a) our motion to strike Hon. Slater's brief and submit a 25-page *pro se* brief traditionally allowed appellants by Ky. R. Civ. P. 76.12(4)(b)(i). They allowed us only a ten-page supplemental brief (App. 36a - 37a). Our April 28, 2014 ten-page *pro se* supplemental brief (App. 58a - 78a) presented that failure to maintain status quo while dealing with legal issues is palpable error citing *Lowe v. Commonwealth*, No. 2012-CA-000046-MR (Ky. Ct. App. June 21, 2013); that road construction does not moot our case citing *West v. Secretary of the Dep't of Transportation*, 206 F.3d 920 (C.A.9, 2000); that Hardin Circuit Court did not have jurisdiction to enforce KYTC's proposed Settlement Agreement and Mutual Release citing *Aro Corp. v. Allied Witan* C2d 1368 (6th Cir. 1976); that our February 3, 2012 appeals took jurisdiction from Hardin Circuit Court citing *Johnson v. Com.*, 17 S.W.3d 109 (Ky. 2000); that Hardin Circuit Court

Civil Action No. 06-CI-01508 must be reversed due to the court's conflict of interests citing *United States v. Nixon*, 418 U. S. 683 (1974) and the Fifth Amendment of the U.S. Constitution, *Carter v. Com.*, 641 S.W.2d 758 (Ky. Ct. App. 1982), and *In re Murchison*, 349 U. S. 133 (1955) which cites *Tumey v. Ohio*, 273 U. S. 510 (1927) and *Offutt v. United States*, 348 U. S. 11 (1954); that the CR 11 sanction must be reversed citing *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987) and *Walters v. Smith*, No. 2011-CA-001026-MR (Ky. Ct. App. July 5, 2013); etc. and that we cannot present all our arguments without being allowed a traditional twenty-five page appellant brief. Nevertheless, Kentucky Court of Appeals March 24, 2017 Opinion Affirming (App. 10a) states:

The McGehees' *pro se* supplemental brief offers primarily conclusory allegations and little in the way of binding authority.

The allegations in the supplemental brief amount to a collection of settled issues and an unpreserved claim for which no relief exists even had it been preserved.

Kentucky Court of Appeals March 24, 2017 Opinion Affirming (App. 7a) relies on a presumption the judicial system will not correct past errors:

The trial court had already made the requisite statutory findings necessary to allow condemnation. Further, this Court had affirmed those findings, making

them the binding law of the case. "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 however erroneous the opinion or decision may have been.'" *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 244 S.W.3d 747, 751 (Ky. App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)).

Reliance on this quote from *Union Light* overlooks its finding that recognizes exceptions to law of the case and corrects the error:

In such a case it is deemed to be the duty of the court to admit its error rather than to sanction an unjust result and "deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case."

Union Light at 542.

We are constrained to admit our own error in holding it was sufficient on the first trial and that as an exception to the law of the case rule, to overrule the former opinion to the extent that it so holds.

Id. at 544. See also *Arizona v. California*, 460 U. S. 605, 618 n. 8 (1983) (“Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.”). Furthermore, law of the case is inapplicable to the Master Commissioner deed (App. 38a - 44a) because Hardin Circuit Court is not enforcing the 2008 Interlocutory Order and Judgment (App. 23a - 28a) but instead is enforcing KYTC’s 2011 proposed Settlement Agreement and Mutual Release (App. 45a - 52a).

REASONS FOR GRANTING THE WRIT

I. MOOTNESS TACTIC IS UNACCEPTABLE

The Ninth Circuit clearly expressed the danger with the mootness doctrine and court’s power to require removal of a completed project:

The building of the towers has not made the case hypothetical or abstract — the towers still cross the fields of the Landowners, continually obstructing their irrigation systems — and this Court has the power to decide if they may stay or if they may have to be removed. . . .

If the fact that the towers are built and operating were enough to make the case nonjusticiable, as the dissent states, then the BPA (and all similar entities) could merely ignore the requirements of NEPA, build its structures before a case

gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.

Columbia Basin Land Protection Assoc. v. Schlesinger, 643 F.2d 585, 591 n.1 (9th Cir.1981).

Here, although Stage 1 of the interchange project is complete, and the new interchange is carrying traffic, West's action is not moot. Stage 2 has not yet begun and, upon finding that defendants failed to comply with NEPA, our remedial powers would include remanding for additional environmental review and, conceivably, ordering the interchange closed or taken down.

West v. Secretary of Dept. of Transp., 206 F.3d 920, 925 (9th Cir. 2000). Seventh Circuit also asserts construction does not moot a NEPA case and the court can order construction to be dismantled:

If plaintiffs and the attorney general were to succeed in showing that the permit had to be revoked or modified, we presumably could order that the facility be dismantled, altered or operated differently.

Van Abbema v. Fornell, 807 F.2d 633, 636-637 (7th Cir. 1986).

In constructing 42 U.S.C. § 4332 Congress makes mandatory that interpretation be in accordance with NEPA and utilize an interdisciplinary approach:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

In constructing 42 U.S.C. § 4331 Congress establishes State and local governments are to cooperate with this NEPA policy for productive harmony for present and future generations:

. . . that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in

productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Taking the meaning as what “the words on the paper say”¹¹ does not allow for agencies to evade NEPA. By 42 U.S.C. § 4371(b) and (c)(1) Congress declares Federal agencies supporting state and local government public work projects shall implement the NEPA policy:

42 U.S.C. § 4371(b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local government.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

¹¹ Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905, 906-908 (2016)

(c) The purposes of this chapter are—
 (1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and . . .

U.S. Army Corps of Engineers supported the Ring Road Extension 4-7010.00 public works activity by its decision to authorize Nationwide Permit 14 coverage (App. 99a - 102a) for the Ring Road Extension. By 40 C.F.R. § 1508.18(a) and (b)(4) this support is a Federal action:

40 C.F.R. § 1508.18(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; . . .

(b) Federal actions tend to fall within one of the following categories: . . .

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

As a four-lane highway project on a new location Ring Road Extension is a "Class I" action that required an Environmental Impact Statement (EIS):

23 C.F.R. § 771.115 Classes of actions.

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs)*. Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location. ...

By the Safe Drinking Water Act Congress decided states shall protect the water supply within wellhead protection areas:

42 U.S.C. § 300h-7. State programs to establish wellhead protection areas

(a) State programs

The Governor or Governor's designee of each State shall, within 3 years of June 19, 1986, adopt and submit to the Administrator a State program to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons. Each State program

under this section shall, at a minimum— . . .

(4) describe a program that contains, as appropriate, technical assistance, financial assistance, implementation of control measures, education, training, and demonstration projects to protect the water supply within wellhead protection areas from such contaminants;

Therefore, Kentucky created The Commonwealth of Kentucky Wellhead Protection Program for incompatible contaminant sources be located outside of sensitive wellhead protection areas (App. 115a – 116a).

Despite the requirement for the Federally supported Ring Road Extension project Item No. 4-7010.00 to comply with the NEPA policy, KYTC admits there has not been NEPA analysis of alternatives to avoid or minimize adverse impacts. Despite U.S. Geological Survey's 1997 publication on Dyers Spring (Gaithers Station Spring) Wellhead Protection Area (App. 86a – 87a), KYTC's Project Manager Gary Valentine testified they did not know of the wellhead protection area when they selected the route into it and have not considered impacts the road or induced growth would have on it (VR 12/14/2007 @ 11:30:50 -11:43:35). KYTC's District Environmental Coordinator Jeffrey Schaeffer testified the state's January 2003 Environmental Overview Worksheet showing "None" for many of the environmental impacts was wrong. Although admitting recognition of the wellhead protection area

was a significant change they did not consider alternatives to avoid it since road design had advanced so far (VR 12/19/2007 @ 9:36:50-9:51:50).

In creating NEPA Congress resolved that environmental values are paramount to highways:

The conflict between Parklands and Highways has *already* been resolved in the Halls of Congress, which is the proper place in our system of Government for priority decisions to be made. And, as the statutes here in question make clear, parklands and environmental values are considered paramount.

Named Ind. Mem. of San Antonio Con. Soc. v. Texas Hy. Dept., 446 F.2d 1013, 1024 (5th Cir. 1971). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 412-413 (1971) ("the very existence of the statutes^[29] indicates that protection of parkland was to be given paramount importance").

By 5 U.S.C. § 706 when a government agency fails to comply with its obligation to consider environmental impacts, courts shall set aside the action.

Kentucky Supreme Court in *Proffitt v. Louisville & Jefferson County*, 850 S.W.2d 852 (Ky. 1993) established whether there had been proper consideration to environmental impacts pursuant to federal laws is a relevant issue in determining if the condemning authority acted arbitrarily and capriciously in condemnation:

The only issue before us is whether MSD acted arbitrarily and capriciously by failing to give proper consideration to the environmental impact of the NCAP.

...

Kentucky has no case law, regulation, statute or constitutional requirement which creates a duty upon a condemning authority to give consideration to the environmental impact of a proposed project beyond those requirements which are already in place pursuant to the numerous federal laws on the subject of the environment.

Id. at 854. Accordingly, Hon. Graddy asserted failure to comply with federal environmental and historic protection laws as abuse of discretion defenses (ROA Vol. I, pp. 27-38). Unlike *Proffitt* where the U.S. Environmental Protection Agency had prepared an Environmental Impact Statement and Environmental Impact Statement supplement (*Id.* at 852-853) there has not been the required federal analysis for the Ring Road Extension (VR 12/14/2007 @ 11:31:55-11:43:35).

This case is not moot because the continuing harms of the four-lane Ring Road Extension to the wellhead protection area (App. 109a) and to Pat's Historic Fannie Harrison Farm (App. 121a) can be corrected by a favorable judicial decision. Kentucky Court of Appeals March 24, 2017 Opinion Affirming (App. 10a) claiming "no relief exists" allows agencies to use the mootness tactic to avoid compliance with federal requirements by completing construction of

portions of projects. Rewarding KYTC with property from the historic Ragland farm as a result of their using the mootness tactic sends the wrong signal.

This court can establish national consistency that the mootness tactic is unacceptable by requiring removal of the short Ring Road Extension from the Gaithers Station Spring (Dyers Spring) Wellhead Protection Area and from the Historic Fannie Harrison Farm. This financial burden is self-inflicted by KYTC risking construction before resolution of legal issues, see *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (“the state entities involved in this case have ‘jumped the gun’ on the environmental issues by entering into contractual obligations that anticipated a pro forma result. In this sense, the state defendants are largely responsible for their own harm.”). Properly located projects allow induced growth to flourish while resources are protected for future generations as Congress intended.

II. STATE COURTS LACK JURISDICTION OVER PROPOSED SETTLEMENT AGREEMENTS OF FEDERAL ISSUES.

Federal precedent established U.S. District Court jurisdiction over enforcement of KYTC’s proposed Settlement Agreement and Mutual Release from U.S. District Court. The 6th Circuit in *Limbright v. Hofmeister*, 566 F.3d 672 (6th Cir. 2009) relied on such cases as *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U. S. 375 (1994) and *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976) to find U.S. District Court has jurisdiction to enforce settlement agreements that produced dismissal of federal suits:

Whether a district court must have ancillary jurisdiction to summarily enforce a settlement agreement is a question of first impression in this circuit. At least two circuits have explicitly addressed this issue since *Kokkonen*, and both held that a district court may rely on a non-ancillary source of jurisdiction. . . . We join these circuits and hold that a district court may rely on any basis of jurisdiction to summarily enforce a settlement agreement that produced the dismissal of an earlier federal suit.

. . . This court has long approved summary enforcement of settlement agreements "in order to promote the... speedy and reasonable resolution to disputes,"^[2] *Bobonik v. Medina Gen. Hosp.*, 126 Fed.Appx. 270, 273 (6th Cir. 2005) (citing *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.1976)), a benefit that accrues regardless of the source of jurisdiction.

. . .

Therefore, we conclude that *Kokkonen* and this court's case law allow an "independent basis for federal jurisdiction," such as diversity or federal question jurisdiction, to support summary enforcement.

Limbright v. Hofmeister, 566 F.3d 672, 674-676 (6th Cir. 2009). KYTC's proposed Settlement Agreement and Mutual Release involves settlement of our Federal environmental claims, our Federal historic protection claims, and our Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act claims. It is hard to imagine Hardin Circuit Court having subject matter jurisdiction to enforce KYTC's proposed Settlement Agreement and Mutual Release from U.S. District Court involving these federal issues.

FTC v. JPMorgan Chase Bank, NA, 53 F. Supp. 3d 972 (E.D. Ky. 2014) explains leaving material terms subject to future negotiation at the contract date makes an agreement-to-agree unenforceable in Kentucky:

As it relates to the key issue of open material terms and prospective negotiation, Kentucky takes an all or nothing approach to contracting.^[8] Thus, while the modern contracting trend would enforce a preliminary agreement that essentially binds the parties to good faith negotiations on open terms, Kentucky treats a preliminary agreement—even one evincing intent to be bound—as unenforceable if material terms remain subject to future or further negotiation.

Id. at 984-985.

The clever argument misses the chronology of contracting under the

Kentucky rule. Even if the parties might likely agree to future terms, even if the parties almost agree to future terms, the fact that terms remain for future negotiation and agreement at the alleged contract date renders an agreement-to-agree unenforceable in Kentucky.

Id. at 988. See also *Cinelli v. Ward*, 997 S.W.2d 474, 478 (Ky. Ct. App. 1999) (“We seem to take the traditional ‘all or nothing’ approach:^[3] Either the agreement is enforceable as a binding contract to consummate the transaction or it is unenforceable as something less.”). Item 9 of KYTC's proposed Settlement Agreement and Mutual Release (App. 51a) includes a “provided that the parties may agree” phrase for future negotiation on the essential element of the amount of compensation for the deed versus settlement of McGehees' claims:

9. At the said closing herein, upon such above-referenced payment, McGehees shall execute and deliver a deed of conveyance for the subject right of way in fee simple absolute and any necessary temporary easements, provided that the parties may agree to allocate some portion of the amount paid hereunder to the consideration for such deed, and some other portion of such payment to consideration for settlement of McGehees' claims against KYTC.

Black's Law Dictionary (5th ed. 1979, p. 1102) defines "provided" as, "The word used in introducing a proviso (q.v.)." and defines "proviso" as, "A condition, stipulation, limitation, or provision which is inserted in a deed, lease, mortgage, or contract, and on the performance or nonperformance of which the validity of the instrument frequently depends; it usually begins with 'provided.'" Therefore, KYTC's proposed Settlement Agreement and Mutual Release is not enforceable in Kentucky.

In the early case of duress *Astley v. Reynolds*, 2 Strange 915, 2 Stra. 915 (1732)¹² a Plaintiff conceded to an improper agreement in order to save a specific plate he treasured but later got the court to break the agreement because the threat left no reasonable alternative since a suit for damages would be inadequate.

Richard McGehee's signed affidavit attached to our Response to Motion for Deed (ROA Vol. IX, pp. 1355 - 1401) presented ample evidence of unresolved issues we sought to pursue in our U.S. District Court case. Item 3 of this affidavit included evidence of duress that the mediation conference ultimatum to settle today or your cherished historic home will be bulldozed down tomorrow (ROA Vol. IX, p. 1356) offered no reasonable alternative. It would not be reasonable to allow it to be bulldozed and then proceed with our U.S. District Court litigation to see if it should have been saved in its historic spatial organization of the farm. Item 5 of this affidavit

¹² 1 John Lansing Wendell, *Reports of Cases Argued and Determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and Correction of Errors of the State of New-York* 812 (1874).

included that our counsel had us sign KYTC's proposed Settlement Agreement and Mutual Release while we were digging up windmill anchors during rain and assuring us we could file objections later (ROA Vol. IX, pp. 358 - 359). Therefore, this affidavit created a genuine dispute of material fact, see 42 U.S.C. § 4651 (7) (no coercive action to obtain settlement agreement involving condemnation of property); see Restatement (Second) of Contracts §175 (1) (contract is voidable when improper threat leaves victim no reasonable alternative); see Restatement (Second) of Contracts §176 (c) and (d) (threat is improper if made in bad faith or in breach of fair dealing). It should be error to order CR 11 sanction in Findings of Fact, Conclusions of Law and Order (App. 19a - 22a) for presenting our evidence. Moreover, using CR 11 sanction to silence a party is grounds to reverse sanctions, see *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484, 485 (3d Cir. 1987), (The Rule is being perverted when used to harass a party into dropping litigation. Hardball practitioners are cautioned Court may impose sanctions on them for such abusive conduct.) It is hard to imagine Hardin Circuit Court having subject matter jurisdiction over our complaint of duress at the U.S. District Court mediation.

III. STRUCTURAL ERRORS IN HARDIN CIRCUIT COURT CIVIL ACTION NO. 06-CI-01508 REQUIRE REVERSAL.

This Supreme Court has consistently found structural error tainting the framework within which a trial proceeds requires reversal. In *Tumey v. Ohio*, 273 U. S. 510 (1927) having a judge with conflicts of interest between his responsibility as mayor for

village finances and his responsibility as judge for impartial decisions deprived the defendant of due process of law violating the Fourteenth Amendment. Then *In re Murchison*, 349 U. S. 133 (1955) found a judge with previous involvement against a defendant's case could not be wholly disinterested and resulted in denial of defendant's opportunity to have other witnesses to refute opposing statements, *Id.* at 137-139. In *Ward v. Monroeville*, 409 U. S. 57 (1972) having a judge with divided responsibilities denied defendant an impartial judge in the first place as guaranteed by the Due Process Clause of the Fourteenth Amendment that cannot be corrected by a trial *de novo*, *Id.* at 58, 61-62. Also the Kentucky case *Carter v. Com.*, 641 S.W.2d 758, 759-760 (Ky. Ct. App. 1982) found "the trial judge committed reversible error in not disqualifying himself given the language of KRS 26A.015(2)(a), (b)" regardless of claims he was not biased.

Since Judge Howard was on the Board of Directors of the Elizabethtown Industrial Foundation (VR 12/14/2007 @ 10:11:51 - 10:20:00), by KY Rev Stat 272A.8-010(2) he had a fiduciary duty to look out for interests of the Foundation. With this conflict of interest by KY Rev Stat 26A.015(2)(a) and (c) he should have disqualified from being a judge in condemnation of the Ragland farm where his Elizabethtown Industrial Foundation wants to acquire the remainder of the farm for an industrial park (App. 104a). By KY Rev Stat 177.082 County Attorney shall either file the petition or assist in prosecution of Department of Highways condemnation. Therefore, by KY Rev Stat 26A.015(2)(a) and (b) Judge Howard should have also disqualified due to being Hardin County Attorney

when the August 21, 2006 condemnation petition was filed (VR 12/14/2007 @ 9:21:52 - 9:27:49).

Although Judge Howard belatedly had to recuse because his conflict of interest with Elizabethtown Industrial Foundation was exposed (VR 12/14/2007 @ 10:11:51 - 10:41:34), the fundamental damages his November 30 and December 6, 2007 orders cutting off discovery (App. 29a – 35a) caused to due process was never corrected. The criteria for disqualification of Judge Howard existed before he got the case so all his orders should be void, see *Ex parte Baer*, 20 F.2d 912, 914 (E.D. Ky. 1927) (Defendant does not waive objection to judge's conflict of interest that is unknown to defendant). Even in his verbal recusal he required the trial continue that day (VR 12/14/2007 @ 10:41:04 - 10:41:34) thereby still preventing discovery. Accordingly, Judge Coleman complied with Judge Howard rather than allow Hon. Graddy to prepare for trial as she had previously ordered on November 13, 2007 (VR 11/13/2007 @ 9:54:00 - 9:56:45).

Hardin Circuit Court's cutting off discovery significantly prejudiced our defense. If Hon. Graddy had been allowed to subpoena expert witness depositions and production of documents *after* KYTC answered interrogatories provided by Ky. Rs. Civ. P. 26.02(4)(a), 30.01, 30.02(1), and 30.02(6), he would have proven the 1.8-mile linear transportation project across a karst sensitive wellhead protection area with five stream crossings straddling a historic property does not meet the "will cause only minimal adverse environmental effects" requirement for nationwide permit coverage by 33 U.S.C. § 1344(e)(1). The nationwide permit coverage needed to

be revoked. Construction activities requiring Department of Army permit coverage at the Valley Creek crossing included discharges of sediment by pit dewatering, stormwater runoff, and erosion of de-vegetated stream banks (App. 103a). The five stream crossings spread out through 1.8 miles control the location of the entire Item No. 4-7010.00 section (App. 96a - 102a) instead of being just one component of a larger project so the scope of analysis covers the entire 1.8 miles by 33 C.F.R. Part 325 Appendix B § 7(b). An individual Department of Army permit by 33 U.S.C. § 1344(a) could have been challenged in a public hearing and in court. Hon. Graddy would have proven to Judge Coleman there are unresolved conflicts concerning alternative uses of available resources therefore requiring a Department of Army Environmental Assessment and/or Environmental Impact Statement by 33 C.F.R. Part 325 Appendix B § 7(a) regarding location of the road. Even Nationwide Permit 14 has general conditions 12 and 16 that require compliance regarding historic properties and public water intakes for permit authorization to be valid (App. 101a and 102a). Comparing plans for Item No. 4-7010.00 (App. 98a) with the outline of the Gaithers Spring Wellhead Protection Area on KYTC's Environmental Overview¹³ (App. 109a) shows direct impact of the Ring Road Extension on this pastoral public water supply protection area.

¹³ To locate select County: Hardin; Prefix: KY, Route: 3005 at:
<http://maps.kytc.ky.gov/photolog/?config=EnvironmentalOverview>
w

Also, creation of the new interchange with I-65 requires Federal Highway Administration approval¹⁴:

23 USC § 111(a) IN GENERAL.—All agreements between the Secretary and the State transportation department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary.

This approval requires Section 4(f) analysis for all possible planning to avoid or minimize harm to an historic site:

23 U.S.C. § 138(a) . . . the Secretary shall not approve any program or project . . . which requires the use of . . . any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

¹⁴ FHWA's July 20, 2012 Section 4(f) Policy Paper, n. 4, <https://www.environment.fhwa.dot.gov/4f/4fpolicy.asp>

By 40 C.F.R. § 1506.1 and 23 U.S.C. § 139(d)(8) the Section 4(f)/NEPA analysis must be for the entire Ring Road Extension project before actions limit alternatives. By KYTC proceeding with construction into the wellhead protection area would limit alternatives to avoid it. There is area south of the wellhead protection area for alternatives to connect to I-65 (App. 109a).

Consequently, Hardin Circuit Court lacked material evidence to render a valid judgment regarding abuse of discretion for locating Item No. 4-7010.00 in the wellhead protection area on the historic farm. See *Washington v. Texas*, 388 U. S. 14, 19 (1967) (The right to offer testimony of witnesses challenging prosecution's witnesses is the due process right to present a defense to find the truth.). *Arizona v. Fulminante*, 499 U. S. 279, 294, 309, 310 (1991) affirmed a biased judge creates a structural defect affecting the entire conduct of the trial that requires reversal:

Vasquez, like *Chapman*, also noted that rule of automatic reversal when a defendant is tried before a judge with a financial interest in the outcome, *Tumey v. Ohio*, 273 U. S. 510, 535 (1927), despite a lack of any indication that bias influenced the decision.

Fulminante at 294.

The other violation, involved in *Tumey v. Ohio*, 273 U. S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of

the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.

Fulminante at 309-310.

Applying *Tumey v. Ohio*, 273 U. S. 510 (1927) and *Ward v. Monroeville*, 409 U. S. 57 (1972) this court should find Hardin Circuit Court Civil Action No. 06-CI-01508 must be reversed with no new trial. The relief we seek also includes KYTC to promptly remove Ring Road Extension from the wellhead protection area and from Pat's Historic Fannie Harrison Farm, declare KYTC's proposed Settlement Agreement and Mutual Release (App. 45a – 52a) is unenforceable, declare the Master Commissioner Deed (App. 38a – 44a) an absolute nullity, require KYTC to monthly reimburse McGehees for costs to restore the condition and spatial arrangement of the Historic Fannie Harrison Farm, reimburse expenses, reimburse attorneys fees, reverse CR 11 sanction, and any additional relief this court deems appropriate.

CONCLUSION

To clarify the mootness tactic is inappropriate and to maintain judicial integrity our petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 13, 2017