Harris v. Commonwealth: The Use of "Statutory" Aggravating Circumstances in Kentucky's Sentencing Procedure

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NOTES

Harris v. Commonwealth:
The Use of “Statutory”
Aggravating Circumstances in
Kentucky’s Sentencing Procedure

BY MELISSA BARTLETT*

I. INTRODUCTION

This Note reviews the Kentucky Supreme Court’s decision in Harris v Commonwealth¹ and suggests that the court and the legislature reexamine the language of Kentucky Revised Statutes section 532.025.² In Harris, the court affirmed the jury’s sentence

* J.D. expected 1999, University of Kentucky. The author wishes to thank Robert G. Lawson, Dorothy Salmon Professor of Law, University of Kentucky, for his help in identifying this issue as a subject for a Note.

¹ Harris v Commonwealth, 793 S.W.2d 802 (Ky. 1990).

² KY. REV STAT. ANN. [hereinafter K.R.S.] § 532.025 (Michie Supp. 1996). This statute has been amended twice since the decision in Harris. In 1996, language was added to section 532.025(1)(a) concerning the admissibility of juvenile court records of adjudications of guilt in subsequent trials where the child is tried as an adult or after the child has become an adult. See Act effective July 15, 1997, ch. 358, sec. 7, 1996 Ky. Acts. In 1998, an eighth aggravating circumstance was added to section 532.025(2)(a), and the sentence of imprisonment for life without benefit of probation or parole was added to the sentences in section 532.025(3) which require the finding of at least one of the statutory aggravating circumstances enumerated in section 532.025(2). See Act approved Apr. 14, 1998, ch. 606, sec. 72, 1998 Ky. Adv. Legis. Serv. 2702, 2702-04 (Michie). These amendments have had no effect on the issue addressed in this Note and demonstrate the Kentucky General Assembly’s failure to address it. This Note will refer to the most recent codified version of section 532.025, the law prior to the 1998 amendments, although it was not the version in effect at the time of the Harris decision.
of life without possibility of parole for twenty-five years for kidnapping the victim even though none of the aggravating circumstances listed in section 532.025(2)(a) existed. The literal language of the capital sentencing statute requires the jury to find the existence of an enumerated statutory aggravating circumstance in order to apply the sentence of death or life without possibility of parole for twenty-five years. In sentencing the defendant, however, the jury found that in the course of kidnapping the victim, Harris committed murder, which is not among those aggravating circumstances listed.

This Note will address the inconsistency in the court’s interpretation and application of section 532.025, as well as a possible separation of powers violation. Furthermore, this Note will discuss the potential federal constitutional implications of Harris in light of Gregg v. Georgia, the leading case on the constitutional administration of the death sentence which caused the Kentucky legislature to change its laws on the death penalty. Finally, this Note will analyze the effect of Harris on future cases in Kentucky.

II. BACKGROUND AND FACTS

A. The Facts

John Anthony Harris was convicted of kidnapping, wanton murder, tampering with physical evidence, and abuse of a corpse. He was subsequently “sentenced to life without possibility of parole for 25 years for kidnapping, life imprisonment for murder, five years’ imprisonment for tampering, and 12 months imprisonment and a $500 fine for abuse of a corpse.” He appealed as a matter of right to the Kentucky Supreme Court, which affirmed his sentence.

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3 See Harris, 793 S.W.2d at 805.
4 See K.R.S. § 532.025(3).
5 See Harris, 793 S.W.2d at 805.
7 See Gully v. Kunzman, 592 F.2d 283, 285 (6th Cir. 1979) (concluding that the death penalty may not be imposed except upon a finding beyond a reasonable doubt of at least one statutorily prescribed aggravating circumstance).
8 See Harris, 793 S.W.2d at 802.
9 Id.
10 In Kentucky, the appellate process affords anyone sentenced to at least 20 years imprisonment one direct appeal to the Kentucky Supreme Court as a matter of right. See KY. CONST. § 110(2)(b).
11 See Harris, 793 S.W.2d at 803.
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Harris had decided to "'play a joke'" on the victim, inviting a friend, James Timothy Elmore, to help him. According to testimony at trial, the two men planned to stop Sabra Ann Diamond's car and scare her. On the night of April 8, 1986, the two men followed Diamond and stopped her car on a deserted road. After Diamond would not acknowledge Harris's presence, Harris pointed a gun at her head. When Diamond opened her door and reached for the gun, Harris pulled the trigger. Diamond "died from a gunshot wound to the head."13

Harris confessed that he and Elmore then placed Diamond into Elmore's car and drove to LaGrange, Kentucky, where they discarded her body in a wooded area. Elmore testified at trial that Harris sexually abused the corpse.14 There was also evidence presented by the police that a small amount of money was missing from Diamond's purse.15

B. Harris's Argument on Appeal

The focus of this Note is Harris’s argument that his aggravated sentence of life imprisonment without possibility of parole for twenty-five years for kidnapping was erroneous because "the jury did not find one of the aggravating circumstances enumerated in K.R.S. § 532.025(2)(a)."16 Harris argued that the express language in section 532.025(3) should apply to his case and would have prevented imposition of the sentence.17

The jury found that "in the course of the commission of the Kidnapping, [Harris] murdered Sabra Ann Diamond."18 The jury subsequently

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12 Id.
13 Id.
14 See id. at 803.
15 See id. at 802-03. Harris was additionally charged with robbery and tampering with physical evidence, but the jury acquitted him of the robbery charge. See id.
16 Id. at 805.
17 See id. Section 532.025(3) states: In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed. K.R.S. § 532.025(3) (Michie Supp. 1996) (emphasis added).
18 Harris, 793 S.W.2d at 805.
sentenced him to life without possibility of parole for twenty-five years.\textsuperscript{19} However, murder is not one of the seven statutory aggravating circumstances listed in section 532.025(2)(a).\textsuperscript{20} Nevertheless, the Kentucky Supreme Court held that the "jury found a proper aggravating circumstance to support the sentence."\textsuperscript{21}

C. The Kentucky Supreme Court's Analysis of Kentucky Revised Statutes Section 532.025

The court rationalized that "the introductory language of . . . [section 532.025(2)] which expressly authorizes the judge and jury to consider 'any aggravating circumstances otherwise authorized by law'" substantiated Harris's sentence.\textsuperscript{22} The court found that "the reference in subsection 3 to

\begin{itemize}
\item \textsuperscript{19} See id.
\item \textsuperscript{20} See K.R.S. § 532.025(2)(a).
\item \textsuperscript{21} Harris, 793 S.W.2d at 805.
\item \textsuperscript{22} Id. Section 532.025(2) reads:
\begin{itemize}
\item (2) In all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence:
\item (a) Aggravating circumstances:
\begin{itemize}
\item 1. The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
\item 2. The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree;
\item 3. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a destructive device, weapon, or other device which would normally be hazardous to the lives of more than (1) person;
\item 4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit;
\item 5. The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of
\end{itemize}
\end{itemize}
\end{itemize}
The court relied upon subsection (1)(b), which "directs the jury in all death penalty cases to determine the existence of any aggravating circumstances 'as defined in subsection (2).'" Thus, the court concluded that a reading of subsection (1)(b) "does not limit the jury's consideration to those aggravating circumstances that are specifically enumerated." In support of its decision, the court noted that "[t]he literal language of the last sentence in subsection 3 is in apparent conflict with the statute's general purpose, as gathered from all parts of the statute." Faced with this conflict, the court concluded that "[t]he literal language must surrender."  

III. KENTUCKY REVISED STATUTES SECTION 532.025

A. History of Kentucky Revised Statutes Section 532.025

Adopted by the 1976 Extraordinary Session of the Kentucky General Assembly, section 532.025 of the Kentucky Revised Statutes provides the sentencing guidelines for Kentucky courts in capital cases. This statute was enacted in response to the decision in Gregg v. Georgia in which the United States Supreme Court held that mandatory death penalty statutes,
such as that contained in the Kentucky Penal Code, were unconstitutional.\textsuperscript{31} Subsequently, the Kentucky General Assembly enacted a “controlled discretion” death penalty statute which requires the “sentencing authority . . . to consider the death penalty as one of a range of sentencing options for defendants convicted of crimes designated elsewhere in the code as ‘capital’ offenses.”\textsuperscript{32} During the sentencing hearing, “the sentencing authority must take evidence concerning the presence or absence of any of a number of mitigating and aggravating factors listed in the statute as well as any other circumstances in mitigation or aggravation of the offense.”\textsuperscript{33} Aggravating circumstances are “those factors which would serve to enhance punishment to a higher degree.”\textsuperscript{34}

\textbf{B. Kentucky Revised Statutes Section 532.025}

According to the Kentucky Supreme Court in \textit{Templeman v. Commonwealth},\textsuperscript{35} “[t]he purpose of K.R.S. 532.025 is to allow evidence of all relevant and pertinent information so that the jury can make an informed decision concerning the appropriate sentence in a particular case.”\textsuperscript{36} Section 532.025 is divided into three main sections. Section 532.025(1) requires that, upon conviction in a case where the death penalty may be imposed, a second hearing must take place before sentencing.\textsuperscript{37} Section 532.025(1)(b) generally describes the manner in which a jury is to be instructed, as well as the procedure for recommending and fixing the sentence.\textsuperscript{38} Specifically, section 532.025(1)(b) states:

\begin{quote}
Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in subsection (2) of this section, exist and to recommend a sentence for the
\end{quote}

\begin{thebibliography}{99}
\bibitem{32} \textit{id.}
\bibitem{33} \textit{id.}
\bibitem{34} Simmons \textit{v. Commonwealth}, 746 S.W.2d 393, 399 (Ky. 1988).
\bibitem{35} \textit{Templeman v. Commonwealth}, 785 S.W.2d 259 (Ky. 1990).
\bibitem{36} \textit{id.} at 260.
\bibitem{38} See \textit{id.} § 532.025(1)(b).
\end{thebibliography}
defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.39

Section 532.025(1) makes a reference to the aggravating and mitigating circumstances specifically defined in section 532.025(2).40 Furthermore, section 532.025(1) provides that "the judge shall fix a sentence within the limits prescribed by law."41

Section 532.025(2) contains seven enumerated and specifically defined aggravating circumstances which the jury can consider during sentencing.42 Section 532.025(3) discusses the procedure which the jury must follow after finding the existence of an aggravating circumstance to recommend a verdict of death or imprisonment for life without possibility of parole for twenty-five years.43 Specifically, the section reads:

The jury, if its verdict be a recommendation of death, or imprisonment for life without benefit of probation or parole, or imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases, the judge shall make such designation. In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed.44

The last sentence of section 532.025(3) is particularly important. The issue in Harris involved statutory interpretation.45 Despite the clear instruction provided by the Kentucky legislature in section 532.025(3), the court opted

39 Id. (emphasis added).
40 See id. § 532.025(1)-(2).
41 Id. § 532.025(1)(b).
42 See id. § 532.025(2).
43 See id. § 532.025(3).
44 Id. (emphasis added).
45 See Harris v. Commonwealth, 793 S.W.2d 802, 805 (Ky. 1990).
to discard this language and rely on the general introductory language of section 532.025(2).\textsuperscript{46}

C. The Application of Kentucky Revised Statutes Section 532.025 in Other Kentucky Cases

There has been some discrepancy in applying Kentucky Revised Statutes section 532.025(3) in light of the language of the other two subsections. This discrepancy centers around the meaning of “statutory.” As in \textit{Harris}, the question confronting the courts is whether the meaning of “statutory” in section 532.025(3) refers to the specific, enumerated aggravating circumstances as listed in section 532.025(2), or whether “statutory” includes the general references throughout the statute to “aggravating circumstances.”\textsuperscript{47}

The Sixth Circuit Court of Appeals in \textit{Gully v. Kunzman}\textsuperscript{48} considered the history of section 532.025 in light of the constitutional limitations set forth by the United States Supreme Court in \textit{Gregg v. Georgia}.\textsuperscript{49} The court concluded that the “sentencing authority may not impose the death penalty except upon a finding, ‘beyond a reasonable doubt,’ of at least one of the statutorily prescribed aggravating factors.”\textsuperscript{50} However, the \textit{Gully} court did not discuss what it meant by “statutorily prescribed.” Yet, in light of \textit{Gregg}, it is implicit that “statutorily prescribed” indicates those factors that are listed by statute, such as those enumerated in section 532.025(2).\textsuperscript{51} The language in the \textit{Gully} decision is proof that Kentucky courts should be limited in their sentencing discretion to those aggravating circumstances specifically listed in section 532.025(2).\textsuperscript{52}

When considering the application of section 532.025, Kentucky courts often cite the rule in \textit{Zant v. Stephens}.\textsuperscript{53} As the Kentucky Supreme Court acknowledged:

\begin{itemize}
    \item \textsuperscript{46} \textit{See supra} notes 22-27 and accompanying text.
    \item \textsuperscript{47} \textit{See}, e.g., \textit{Harris}, 793 S.W.2d at 805.
    \item \textsuperscript{48} \textit{Gully v. Kunzman}, 592 F.2d 283 (6th Cir. 1979).
    \item \textsuperscript{49} \textit{See id. at 285}.
    \item \textsuperscript{50} \textit{Id. at 286}.
    \item \textsuperscript{51} \textit{See K.R.S. § 532.025(2)(a)} (Michie Supp. 1996).
    \item \textsuperscript{52} \textit{See Gully}, 592 F.2d at 286.
    \item \textsuperscript{53} \textit{Zant v. Stephens}, 462 U.S. 862 (1983) (holding that the defendant’s prior criminal record was properly admitted under the Georgia statute even though one of the statutory aggravating circumstances had been found vague under state law).
\end{itemize}
In Zant, the United States Supreme Court states that once there is proof of a statutory aggravating circumstance sufficient to put the defendant in the class eligible for the death penalty, the decision as to whether the death penalty is appropriate in the particular case then depends on the individualized circumstances in the case.\(^5\)

In Zant, the defendant challenged his sentence because his prior criminal record was admitted under a Georgia statute similar to section 532.025(1)(a) of the Kentucky Revised Statutes.\(^5\) The United States Supreme Court held that one of the statutory aggravating circumstances which the jury may have considered in the defendant’s sentencing was vague under state law.\(^6\) It is noteworthy that the Court in Zant, although finding one of the aggravating circumstances to be invalid, nevertheless affirmed the judgment on the grounds that the other aggravating circumstances listed in the Georgia statute were sufficient to uphold the sentence.\(^5\) Therefore, it can be argued that in light of the decision in Zant, the United States Supreme Court would not find a requisite aggravating circumstance in order to affirm Harris.

Other Kentucky cases have interpreted the application of section 532.025.\(^5\) In Gall v. Commonwealth,\(^5\) the court concluded, “If [the jury] finds the existence of one or more aggravating circumstances as specified in KRS 532.025(2)(a), it is authorized to recommend the death penalty, but the trial court is not bound to impose it.”\(^6\) The court expressly referred to the specific aggravating circumstances listed in section 532.025.\(^5\) Implicit in the court’s rationalization is that those aggravating circumstances not enumerated would not suffice as authority for imposing the death penalty.\(^6\)

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\(^5\) See Skaggs, 694 S.W.2d at 678 (citing Zant, 462 U.S. at 878).

\(^6\) See Zant, 462 U.S. at 867.

\(^5\) See id. at 890.

\(^5\) See Templeman v. Commonwealth, 785 S.W.2d 259, 260 (Ky. 1990) (stating the purpose of section 532.025 is to allow the jury to hear all relevant information so they can make an informed decision concerning an appropriate sentence).


\(^6\) Id. at 104.

\(^5\) See id.

\(^6\) See id.
Furthermore, the court in *Gall* stated, "The trial court cannot sentence a defendant to death unless the jury, by a unanimous verdict, has found beyond a reasonable doubt the existence of one or more of the aggravating circumstances listed in KRS 532.025(2)(a)."\(^6^3\)

Although *Gall* involved the appeal from a death sentence, section 532.025(3) does not differentiate between the procedure that must be followed for a verdict of the death sentence or life without possibility of parole for twenty-five years.\(^6^4\) Although the reasoning of *Gall* should apply to the facts in *Harris*, the Kentucky Supreme Court, despite the clear language of section 532.025(3), has interpreted this statute to mean that any aggravating circumstance, not just those listed in section 532.025(2), will satisfy application of the death penalty or life without possibility of parole for twenty-five years.\(^6^5\)

There are other cases in which the court has chosen to follow the *Harris* line of analysis. In *Stanford v. Commonwealth*,\(^6^6\) the defendant appealed the exclusion of evidence of a mitigating circumstance.\(^6^7\) In that death penalty case, the specific issue in *Harris* was not addressed, yet the court reaffirmed its interpretation of section 532.025 by a general reference to the statute.\(^6^8\) The court stated, "The statute says that the judge or the jury shall consider 'any mitigating circumstances or aggravating circumstances otherwise authorized by law' and any of the eight statutory circumstances of mitigation."\(^6^9\)

In *Jacobs v. Commonwealth*,\(^7^0\) the court revisited its holding in *Harris*. The court, citing *Harris*'s interpretation of section 532.025(3) along with section 532.025(2), reaffirmed its position regarding aggravating circumstances.\(^7^1\) The court observed, as it did in *Harris*, that section 532.025(3) is "inartfully drafted."\(^7^2\) Concluding that the "literal language" of section 532.025(3) must surrender to the general purpose of the statute, the court held that "the jury's consideration of aggravating circumstances was not

\(^{63}\) *Id.* (emphasis added).

\(^{64}\) See K.R.S. § 532.025(3) (Michie Supp. 1996).

\(^{65}\) See *Harris v. Commonwealth*, 793 S.W.2d 802, 805 (Ky. 1990).


\(^{67}\) See *id.* at 788.

\(^{68}\) See *id.* at 790.

\(^{69}\) *Id.*

\(^{70}\) *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994).

\(^{71}\) See *id.* at 420.

\(^{72}\) *Id.*
limited to one exactly and specifically enumerated in this statute.”

Thus, the court declared the term “statutory” to be a general concept.

The Kentucky Supreme Court in Tamme v. Commonwealth examined the procedure by which a judge, in sentencing from the bench, must apply section 532.025(3) in light of section 532.025(2). The court observed that “[a] jury, as trier of fact, by its verdict, must find specified aggravating circumstances in order to pass constitutional muster.” The court then concluded that a trial judge “may examine all the circumstances of the case,” which “may go beyond the statutory aggravators.” Again, implicit in the court’s use of “specified” and “statutory” is the fact that correct application of section 532.025(3) includes the finding of a specific statutory aggravating circumstance as listed in section 532.025(2) rather than any aggravating circumstance as reasoned in Harris.

The court has inconsistently interpreted section 532.025. Harris and its progeny are still good law, but so is Tamme. In Jacobs, the court itself recognized that section 532.025 is difficult to interpret and “inartfully drafted.” The result is that judges in Kentucky are presented with conflicting case law setting forth the limits under which they can administer sentences.

D. Justice Leibson’s Interpretation of Kentucky Revised Statutes
Section 532.025

Justice Leibson authored a powerful dissent in Harris. He argued that the majority upheld the sentence

on the basis that the murder of the victim in the course of the commission of kidnapping is an aggravating circumstance “otherwise authorized by law.” The Majority so holds by quoting only a portion of the statute and despite the fact that no statutorily enumerated circumstances were found

73 Id.
74 See id.
75 Tamme v. Commonwealth, 759 S.W.2d 51 (Ky. 1988).
76 Id. at 55 (emphasis added).
77 Id. (emphasis added).
78 Jacobs, 870 S.W.2d at 420.
as required by KRS 532.025(2) and KRS 532.025(3). . . . The Majority’s interpretation is strained and fails to give effect to the statute as a whole.\textsuperscript{79}

Justice Leibson reasoned that since section 532.025(2) uses the conjunction “and,” “the statute requires at least one of the enumerated statutory circumstances to be found.”\textsuperscript{80} He addressed the need to recognize the clear language of the statute when applying section 532.025(3) in terms of section 532.025(2) by concluding that “otherwise the General Assembly would have used the disjunctive ‘or’ instead of the conjunctive ‘and’ between the two phrases in KRS 532.025(2).”\textsuperscript{81} He noted that the statute was written to comply with federal standards as set forth by Gregg and that Gregg “mandates ‘a jury’s discretion must be channeled . . . [and] circumscribed by the legislative guidelines.’”\textsuperscript{82} Furthermore, as Justice Leibson pointed out, the decision in Harris “eliminates the need to specify a statutory aggravating circumstance . . . as required by United States Supreme Court decisions.”\textsuperscript{83} Thus, Justice Leibson argued that the correct interpretation of “statutory” aggravating circumstances, unlike the majority’s interpretation in Harris, includes only the aggravating circumstances listed in section 532.025(2).\textsuperscript{84}

Justice Leibson’s analysis is consistent with his opinions in other Kentucky cases. Writing for the court in Matthews v. Commonwealth,\textsuperscript{85} he reasoned that section 532.025(1)(b) “specifies that the jury . . . shall consider statutory aggravating circumstances” and that “United States Supreme Court requirements of specified statutory aggravating circumstances before imposition of the death penalty are satisfied by our death penalty statute . . . by requiring a finding of specified statutory aggravating circumstances from the jury.”\textsuperscript{86} Likewise, in his concurrence in McClellan v. Commonwealth,\textsuperscript{87} Justice Leibson noted that the United States Supreme Court required “additional statutory aggravating factors before placing the

\textsuperscript{79} Harris v. Commonwealth, 793 S.W.2d 802, 808 (Ky. 1990) (Leibson, J., dissenting) (emphasis added).
\textsuperscript{80} Id. (Leibson, J., dissenting).
\textsuperscript{81} Id. at 809 (Leibson, J., dissenting).
\textsuperscript{82} Id. (Leibson, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).
\textsuperscript{83} Id. (Leibson, J., dissenting).
\textsuperscript{84} See id. (Leibson, J., dissenting).
\textsuperscript{85} Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985).
\textsuperscript{86} Id. at 423.
\textsuperscript{87} McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986).
murderer in the select group that should be eligible for the death penalty.” Throughout his tenure on the court, Justice Leibson consistently focused on statutory aggravating circumstances, emphasizing the significance of the United States Supreme Court’s language.  

IV. SEPARATION OF POWERS

In the recent case of **Guiliani v. Guiler**, Justice Cooper based his dissent on the importance of the separation of powers doctrine in Kentucky. He stated:

> There are few constitutional principles more sacred than the doctrine of Separation of Powers. This principle is strongly enunciated in Section 27 of our Constitution, which establishes three separate and distinct branches of government, and in Section 28, which specifically prohibits one branch from exercising any power belonging to either of the others, except as permitted elsewhere in the Constitution.

The decision in **Harris** raises concerns as to whether the court violated the separation of powers doctrine in the manner in which the court interpreted the language of Kentucky Revised Statutes section 532.025.

In **Harris**, the court declared that “subsection 3 of KRS 532.025 is inartfully drafted” and decided to look at the general purpose of the statute, rather than its literal language. Citing **Oates v. Simpson**, the **Harris** court stated that “[t]he literal language must surrender.” The court reasoned that “the reference in subsection 3 to ‘statutory aggravating circumstances enumerated in subsection 2’ is a reference to all of subsection 2, not merely to that portion which lists specific statutory aggravating circumstances.” According to the court, “[s]ubsection 1(b) directs the jury in all death penalty cases to determine the existence of any aggravating circumstances ‘as defined in subsection (2)’ and hence does not limit that

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88 Id. at 475 (Leibson, J., concurring).
89 See id. (Leibson, J., concurring).
90 Guiliani v. Guiler, 951 S.W.2d 318 (Ky. 1997).
91 Id. at 325 (Cooper, J., dissenting).
92 Harris v. Commonwealth, 793 S.W.2d 802, 805 (Ky. 1990).
93 See id.
94 Oates v. Simpson, 174 S.W.2d 505 (Ky. 1943).
95 Harris, 793 S.W.2d at 805 (citing Oates, 174 S.W.2d at 507).
96 Id. (quoting K.R.S. § 532.025(3) (Michie Supp. 1996)).
jury's consideration to those aggravating circumstances that are specifically enumerated." 97

Examination of the phrase "as defined" in terms of its literal meaning suggests that the aggravating circumstances must be clearly defined. The reference to other circumstances "authorized by law" in the introductory language of section 532.025(2) is vague and does not "define" the circumstances. Therefore, the court's reliance on the general phrase "as defined in subsection (2)" 98 is misplaced.

A. Plain Meaning, Literal Language

In Simmons v. Commonwealth, 99 the Kentucky Supreme Court stated, "Ordinarily we construe statutes in the light of the plain meaning of the words contained therein, and resort to legislative intent only when words used in the statute are ambiguous." 100 Similarly, the court held in Hawley Coal Co. v. Bruce 101 that "[w]here the Legislature has made no exception to the positive terms of [a] statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction." 102 The court further explained, "When language is clear and unambiguous, it will be held to mean what it plainly expresses." 103

The language in section 532.025(3) is plain. The Harris court did not contest this. The statute states:

In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence, shall not be imposed. 104

The literal meaning of the italicized portion of subsection three is clear. Section 532.025(3) unambiguously states that a prerequisite must be found

97 Id. (quoting K.R.S. § 532.025(1)(b)).
98 Id. (quoting K.R.S. § 532.025(1)(b)).
99 Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988).
100 Id. at 398-99.
101 Hawley Coal Co. v. Bruce, 67 S.W.2d 703 (Ky. 1934).
102 Id. at 705.
103 Id. (citing Gilbert v. Greene, 216 S.W. 105 (Ky. 1919)).
before imposition of the death penalty or imprisonment for life without parole until the defendant has served a minimum of twenty-five years.\textsuperscript{105}

The prerequisite is that one of the seven statutory aggravating circumstances specifically listed by the General Assembly in section 532.025(2) must be found by the jury and designated in writing.\textsuperscript{106} In \textit{Harris}, the court rejected this literal language, despite its plain meaning.\textsuperscript{107}

Of particular importance is the fact that this statute is penal in nature. One goal of our legal system is a fair administration of justice. This concept of justice includes proportional punishment.\textsuperscript{108} To ensure proportional punishment, the General Assembly has the responsibility of providing unambiguous language for the courts to use as guidelines to administer justice. Once the legislature has created the law, it is the responsibility of the court to interpret the law and to evaluate the constitutionality of the law.

The stakes are high for a defendant facing a criminal charge. Individual liberties are at issue. The consequence of conviction can be imprisonment or even death. Thus, it is important to ensure the fair administration of the law. As the court in \textit{Katzman v. Commonwealth}\textsuperscript{109} explained long ago, "[i]t would of course be extremely desirable if every penal statute could be made so plain as not to leave any doubt as to its meaning, and so intelligible as that every person could by reading it at once decide what he might with safety do under it."\textsuperscript{110} The \textit{Katzman} court continued:

\begin{quote}
The court cannot depart from the plain meaning of the words in a penal act, and adjudge that punishable under the statute which its language does not fairly cover. But, in determining what may be punished under the words of a statute, the court must apply the rule that every statute shall be
\end{quote}

\begin{itemize}
\item \textsuperscript{105} \textit{See id.}
\item \textsuperscript{106} \textit{See id.} § 532.025(2)-(3).
\item \textsuperscript{107} \textit{See} \textit{Harris v. Commonwealth}, 793 S.W.2d 802, 805 (Ky. 1990) (holding that the introductory language of section 532.025(2) meant the jury could consider any aggravating circumstances permitted by law).
\item \textsuperscript{108} \textit{See generally} \textit{Gregg v. Georgia}, 428 U.S. 153 (1976); \textit{Slaughter v. Commonwealth}, 744 S.W.2d 407 (Ky. 1987); \textit{Smith v. Commonwealth}, 734 S.W.2d 437 (Ky. 1987); \textit{Halvorsen v. Commonwealth}, 730 S.W.2d 921 (Ky. 1987); \textit{McClellan v. Commonwealth}, 715 S.W.2d 464 (Ky. 1986); \textit{Bevins v. Commonwealth}, 712 S.W.2d 932 (Ky. 1986); \textit{Marlowe v. Commonwealth}, 709 S.W.2d 424 (Ky. 1986); \textit{Matthews v. Commonwealth}, 709 S.W.2d 414 (Ky. 1985).
\item \textsuperscript{109} \textit{Katzman v. Commonwealth}, 130 S.W. 990 (Ky. 1910).
\item \textsuperscript{110} \textit{Id.} at 992.
\end{itemize}
construed literally, with a view to carry out the intention of the Legislature and promote its objects, taking all ordinary words and phrases according to the common and approved use of language.\footnote{\textit{Id.} (citing Commonwealth v. Trent, 77 S.W. 390 (Ky. 1903))}

The intention of the Kentucky General Assembly with respect to the application of section 532.025 is plain upon a literal reading of the language of section 532.025(3). The court should recognize that plain intent.

B. Rule for Interpreting Statutes

The \textit{Harris} court relied on language from \textit{Oates v. Simpson}\footnote{\textit{Oates v. Simpson}, 174 S.W.2d 505 (Ky. 1943).} for its decision to disregard the plain, literal language of section 532.025(3).\footnote{\textit{Id.}} The rule of \textit{Oates} is that "literal language contained in some parts of [the statute], in apparent conflict with the general scheme should surrender to the general purpose and intent of the legislature as gathered from all parts of the statute."\footnote{\textit{Oates}, 174 S.W.2d at 507.} The \textit{Harris} court reasoned that, despite the plain language of section 532.025(3), the literal language should surrender to the general purpose of the statute.\footnote{\textit{See Harris v. Commonwealth, 793 S.W.2d 802, 805 (Ky. 1990).}} The court stated, "The literal language of the last sentence in subsection 3 is in apparent conflict with the statute’s general purpose, as gathered from all parts of the statute. The literal language must surrender."ootnote{\textit{Id.}} Specifically, the court noted that its interpretation of the statute is supported by the language of section 532.025(1)(b), which "directs the jury in all death penalty cases to determine the existence of any aggravating circumstances ‘as defined in subsection (2).’"\footnote{\textit{Id.} (quoting K.R.S. § 532.025(1)(b) (Michie Supp. 1996)).} The court explained that the introductory language of section 532.025(2) "expressly authorizes the judge and jury to consider ‘any aggravating circumstances’"\footnote{\textit{Id.} (quoting K.R.S. § 532.025(2)).} despite the specifically enumerated statutory aggravating circumstances which are listed.\footnote{\textit{Id.}}

One function of strict compliance with statutory language is the fulfillment of the public policy considerations which underlie the creation
of the statute. The General Assembly is composed of elected representa-
tives of the populace. One function of the legislature is to create laws, as
needed, to reflect public policy principles of its constituents. The court in
Riley v. Kentucky Production Credit Ass'n\textsuperscript{119} accurately stated, "It is true
that it is a prerogative of the General Assembly to establish public
policy."\textsuperscript{120}

Murder is the only aggravating circumstance which the jury in \textit{Harris}
found beyond a reasonable doubt to support the sentence of life without
possibility of parole for twenty-five years.\textsuperscript{121} However, murder is not one
of the seven statutory aggravating circumstances enumerated in section
532.025(2).\textsuperscript{122} The question to be considered is whether the absence of
murder as a statutory aggravating circumstance for kidnapping correctly
reflects legislative intent. As Justice Leibson suggested in his dissent, the
legislature had the power to enumerate what other crimes or aggravating
circumstances would authorize the imposition of the death penalty or life
without parole for twenty-five years.\textsuperscript{123} If the legislature had wanted murder
to be an aggravating circumstance for kidnapping, it should have so
provided. Justice Cooper, commenting on the separation of powers doctrine
in Kentucky, has stated, "[T]he fact that the legislature may make a wrong
decision is no reason why the judiciary should invade what has been
designated as the exclusive domain of another department of government
. . . . [T]he people have reposed that responsibility in the legislature."\textsuperscript{124} In
summary, it was not the prerogative of the court to add an aggravating
circumstance to the statute even if the court considered the omission to be
a serious oversight.

\textbf{V. HARRIS \textit{v. COMMONWEALTH AND} GREGG \textit{v. GEORGIA}}

Not only did the court in \textit{Harris} misinterpret Kentucky Revised
Statutes section 532.025 and arguably breach the separation of powers
doctrine, the court may have also violated federal constitutional provisions
pertaining to sentencing in capital cases as outlined in \textit{Gregg v. Georgia}.\textsuperscript{125}

\textsuperscript{119} Riley v. Kentucky Product. Credit Ass'n, 603 S.W.2d 916 (Ky. Ct. App.
1980).
\textsuperscript{120} Id. at 917.
\textsuperscript{121} See \textit{Harris}, 793 S.W.2d at 802.
\textsuperscript{122} See K.R.S. § 532.025(1)(b).
\textsuperscript{123} See \textit{Harris}, 793 S.W.2d at 802 (Leibson, J., dissenting).
\textsuperscript{124} Guiliani v. Guiler, 951 S.W.2d 318, 325 (Ky. 1997) (Cooper, J., dissenting)
(citing Raney v. Stovall, 361 S.W.2d 518, 523-24 (Ky. 1962)).
A. Gregg v. Georgia

Four years after the United States Supreme Court decided Furman v. Georgia, the Court revisited the constitutionality of the death penalty in Gregg v. Georgia. In Furman, the Court held that the Georgia statute in effect at the time gave the sentencer “unguided discretion” with respect to the imposition of the death penalty, and that the penalty was being used “discriminatorily, wantonly and freakishly and so infrequently that any given death sentence was cruel and unusual.” As a result, the Georgia legislature enacted a new statute, which narrowed the class of defendants eligible for the death penalty by identifying the aggravating factors “which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death.”

In its examination of the constitutionality of Georgia’s new statute, the Gregg Court considered principles from Furman. The Court stated, “Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” Additionally, the Court noted that “the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”

The Court in Gregg carefully examined the language and application of the new Georgia statute. This statute provided enumerated statutory aggravating circumstances, one of which must be found by the jury in the determination to sentence the convicted to death. The Court found that this new statutory scheme could be constitutionally implemented.

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128 Id. at 220-21.
129 Id. at 221 (White, J., concurring).
130 Id. at 189. See generally Paye, supra note 54.
133 See Gregg, 428 U.S. at 195.
134 See id.
Ultimately, the Court in Gregg concluded that the death penalty as a form of capital punishment does not violate the Eighth and Fourteenth Amendments of the Constitution. In reaching this decision, however, the Court carefully reviewed the procedure by which the death penalty could be utilized in the sentencing phase of a trial. Furthermore, the Court explored the role of the legislature in creating statutes authorizing the application of the death penalty, as well as the responsibility of the courts in interpreting such statutes.

B. Georgia’s Statute Enumerating Aggravating Circumstances

Georgia’s post-Furman statute specified ten statutory aggravating circumstances, “one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.” Thus, the new statute attempted to narrow the class of those eligible for the death penalty. The Court noted that in addition to these ten statutory aggravating circumstances, “the jury is authorized to consider any other appropriate aggravating . . . circumstances . . . in order to make a recommendation of mercy that is binding on the trial court . . . but it must find a statutory aggravating circumstance before recommending a sentence of death.”

135 See id.
137 See Gregg, 428 U.S. at 174-75.
138 Id. at 196-97.

Justice Marshall noted:

The Court’s conclusion in Gregg was not unconditional; it was expressly based on the assumption that the Georgia Supreme Court would adopt a narrowing construction that would give some discernible content to § (b)(7). In the present case, no such narrowing construction was read to the jury or applied by the Georgia Supreme Court on appeal. As it has so many times in the past, that court upheld the jury’s finding with a simple notation that it was supported by the evidence.

Id. at 434.

140 Gregg, 428 U.S. at 197 (emphasis added). In Zant v. Stephens, 462 U.S. 862 (1983), the Court stated:
The [plurality’s] approval of Georgia’s capital punishment procedure rested primarily on two features of the scheme: that the jury was required to find
C. The Role of the Court and the Legislature

The Court in *Gregg* discussed at great length the distinct function of the judiciary regarding interpretation of law and the responsibility and power of the legislature to create such law.\textsuperscript{141} The Court stated that “the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.”\textsuperscript{142} However, the Court explained, “Courts are not representative bodies. They are not designed to be a good flex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence.”\textsuperscript{143}

Thus, the Court emphasized the importance of adherence to the separation of powers doctrine when interpreting penal statutes such as the Georgia statute.\textsuperscript{144} The Court recognized that there is a presumption that laws created and enacted by the legislature are valid.\textsuperscript{145} “Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity . . . . And a heavy burden rests on those who would attack the judgment of the representative of the people.”\textsuperscript{146} Moreover, the Court stated, “[W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.”\textsuperscript{147} The Court implied that once the legislature has spoken as to the punishment for a crime, the punishment should stand unless application of that punishment would

\textsuperscript{141} See *Gregg*, 428 U.S. at 174-75.
\textsuperscript{142} *Id.* at 174.
\textsuperscript{143} *Id.* at 175 (citing *Dennis v. United States*, 341 U.S. 494, 525 (1951)).
\textsuperscript{144} See *id.*
\textsuperscript{145} See *id.*
\textsuperscript{146} *Id.*
\textsuperscript{147} *Id.* at 174-75.
involve a violation of the Constitution. For example, a court may often examine a particular statute to determine if it is overly broad, vague, or discriminatory.

D. The Effect of Harris in Light of Gregg

Although the defendant in Harris was not sentenced to death, the principles regarding statutory interpretation set forth in Gregg apply. The issue in Harris centers on whether, according to Kentucky Revised Statutes section 532.025(3), the jury can sentence a defendant to death or life without possibility of parole for twenty-five years only if the jury finds at least one of the statutory aggravating circumstances to exist.

Section 532.025 is strikingly similar to the statute in question in Gregg. The Georgia statute lists ten statutory aggravating circumstances. Section 532.025(2)(a) lists seven. Nevertheless, the circumstances listed are similar. Especially significant is the similar language referencing "statutory aggravating circumstances." Section 532.025 was modeled after the Georgia statute, which was declared constitutional by the United States Supreme Court in Gregg. This signals that the Kentucky legislature took note of Gregg and passed the statute as a safeguard to insure that any subsequent review of Kentucky's death sentencing procedure would at least pass constitutional muster.

While similarities in the two statutes are important, it is even more important to consider the holding in Harris in light of the principles of statutory interpretation that Gregg announced. In Godfrey v.

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148 See Harris v. Commonwealth, 793 S.W.2d 802, 802 (Ky. 1990).
150 See Gregg, 428 U.S. at 165 n.9 (quoting GA. CODE ANN. § 27-2534.1 (Supp. 1975) (current version at GA. CODE ANN. § 17-10-30 (1997))).
151 See K.R.S. § 532.025(2)(a).
152 Id. § 532.025(2); Gregg, 428 U.S. at 165 n.9 (quoting GA. CODE ANN. § 27-2534.1(b)).
154 The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. . . . it [jury] is always circumscribed by the legislative guidelines.

Justice Marshall emphasized the importance of the Gregg principles in his concurrence by stating that “[n]early every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of Gregg and its progeny.” Justice Marshall continued, “The Court’s cases make clear that it is the sentencer’s discretion that must be channeled and guided by clear, objective, and specific standards.”

The Kentucky General Assembly enacted section 532.025 to provide specific standards to guide a jury when deliberating whether to impose a capital sentence. These standards are listed in section 532.025(2) and required by section 532.025(3). Thus, the aggravating circumstances listed in section 532.025(2) serve as the necessary specific standards for Kentucky’s capital sentencing procedure. Such standards are important for the juries to assess the appropriate sentence. As the Court in Gregg stated:

The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other

("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.").

156 Id. at 438 (Marshall, J., concurring). Justice Marshall stated:
On numerous occasions since Gregg, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of Gregg and its companion cases. These developments, coupled with other persuasive evidence, strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in Gregg.
Id. at 438-39 (Marshall, J., concurring).
157 Id. at 437 (Marshall, J., concurring).
158 See GOVERNOR’S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 76 (1997) [hereinafter FINAL REPORT AND RECOMMENDATIONS].
160 See id. § 532.025(2).
course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . While some have suggested that standards to guide a capital jury’s sentencing deliberations are impossible to formulate, the fact is that such standards have been developed.\textsuperscript{161}

Kentucky Revised Statutes section 532.025(3) provides a specific limitation on the jury that if it cannot find the existence of at least one of the circumstances listed in section 532.025(2) beyond a reasonable doubt, then the death penalty or life without possibility of parole for twenty-five years is not an option.\textsuperscript{162}

Furthermore, as in \textit{Furman}, the Court in \textit{Gregg} was concerned with arbitrary and capricious infliction of the sentence of death. The \textit{Godfrey} Court explained:

\begin{quote}
In \textit{Furman v. Georgia} . . . the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. \textit{Gregg v. Georgia, supra}, reaffirmed this holding . . . .

. . . .

This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.\textsuperscript{163}
\end{quote}

The Kentucky legislature has authorized the means of administering capital punishment by its specific language in Kentucky Revised Statutes section 532.025. The legislature has tailored section 532.025(3) to give the jury a standard for sentencing deliberations to prevent “arbitrary” or “capricious” application of capital punishment. The Kentucky Supreme Court’s interpretation of section 532.025 in \textit{Harris} may jeopardize the statute’s constitutionality.

\section{Analysis}

The \textit{Harris} decision presents these issues: whether it reflects a correct application of Kentucky Revised Statutes section 532.025 and, if not, what effect this decision has on Kentucky law. As previously discussed, there is

\begin{itemize}
\item \textsuperscript{161} Gregg v. Georgia, 428 U.S. 153, 192-93 (1976).
\item \textsuperscript{162} See K.R.S. § 532.025(3).
\item \textsuperscript{163} Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980).
\end{itemize}
substantial evidence that the Kentucky Supreme Court decided this case incorrectly. Other than due process and stare decisis concerns, the importance of analyzing *Harris* is the impact this decision has on the development of Kentucky law.\textsuperscript{164}

While it may seem reasonable to receive a sentence of life without possibility of parole for twenty-five years for the crime of kidnapping where a murder is committed in the course of the kidnapping, the Kentucky legislature has not so provided. A court cannot violate the doctrine of separation of powers to compensate for the silence of a legislature. Although the *Harris* court acknowledged that section 532.025(3) requires a finding of an aggravating circumstance in section 532.025(2), the court nevertheless decided to rely on the introductory language of section 532.025(2) as authority for the jury to recommend a capital sentence.\textsuperscript{165} That introductory language allows the jury to consider any other circumstance "otherwise authorized by law."\textsuperscript{166}

When the court misapplied this introductory language, a violation of the separation of powers doctrine occurred. By applying this introductory language to fit the outcome of this case, the court, in essence, created a new statutory aggravating circumstance, which may be unconstitutional. Further, it ignored the fact that the legislature drafted the law to include specific enumerated aggravating circumstances.

Although section 532.025(2), as enacted by the legislature, arguably satisfies the "specificity" requirement of the *Godfrey* case,\textsuperscript{167} the court’s interpretation of the statute may render it subject to constitutional challenge. By relying on the use of the introductory language of section 532.025(2) to allow the jury to consider any aggravating circumstance "otherwise authorized by law," and thus permitting the imposition of a capital sentence,\textsuperscript{168} the court in *Harris* may have rendered the statutory language vague. "Authorized by law" could represent several meanings. One interpretation of this phrase would limit "authorized by law" to those circumstances enumerated in section 532.025(2) of the statute. A broader

\textsuperscript{164} See generally FINAL REPORT AND RECOMMENDATIONS, supra note 158, at 78 (recommending that "a Sentencing Commission should be created to conduct a comprehensive review of sentencing in Kentucky and make recommendations regarding reform of the current structure").

\textsuperscript{165} See *Harris* v. Commonwealth, 793 S.W.2d 802, 805 (Ky. 1990).

\textsuperscript{166} K.R.S. § 532.025(2).

\textsuperscript{167} See *Godfrey*, 446 U.S. at 428 (requiring "specific and detailed" guidance) (citing Proffitt v. Florida, 428 U.S. 242, 253 (1976)).

\textsuperscript{168} See *Harris*, 793 S.W.2d at 805.
and more vague interpretation could include virtually any other circumstance which a judge would deem appropriate to the facts.

Moreover, if the intent of the legislature was to include a "catch-all" aggravating circumstance outside of those enumerated, the legislature could have included an eighth circumstance which indicated, "or any other circumstance." *Expressio unius est exclusio alterius.* Since the legislature specifically included seven circumstances under section 532.025(2), the legislature's silence as to an eighth "catch-all" circumstance should not be overlooked. If the legislature intended a "catch-all," it seems the appropriate place to list one would be after the enumerated circumstances.

What then is the purpose for consideration of nonstatutory aggravating circumstances? One purpose for considering a nonstatutory circumstance could be to supplement the total circumstances the jury may consider. The jury must consider any of the statutory aggravating circumstances enumerated and any other circumstance authorized by law. However, section 532.025(3) indicates that there still must be a jury finding of at least one of the enumerated circumstances in order to apply a death sentence or a sentence of life without possibility of parole for twenty-five years. Another role of the nonstatutory circumstance could be to aid the jury when considering all of the circumstances, but a nonstatutory circumstance could not be used to apply the death sentence or life without possibility of parole for twenty-five years.

If the purpose of the nonstatutory circumstance is to supplement consideration of the statutory circumstances, then what effect does *Harris* have on Kentucky law? As mentioned above, there is a stare decisis concern. *Harris* is still good law in Kentucky courts. On July 1, 1997, Kentucky executed Harold McQueen by electric chair, which was the first execution since the death penalty was reinstated.

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169 "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990).
171 See Final Report and Recommendations, supra note 158, at 76-77 (recommending that the circumstances listed in section 532.025 be expanded to include the following aggravating circumstances: (1) The murder of a witness in a civil or criminal proceeding; (2) the murder of a child under the age of twelve; and (3) a murder which is premeditated or planned). See generally Jack Brammer, Longer Jail Terms Recommended for Violent Crimes, Lexington Herald-Leader (Lexington, Ky.), Nov. 21, 1997, at A1.
172 See K.R.S. § 532.025(2).
173 See id. § 532.025(3).
execution in Kentucky in thirty-five years.\textsuperscript{174} If \textit{Harris} is still good law, then Kentucky judges are confronted with the absence of a clear standard for what can be considered a valid aggravating circumstance under section 532.025(3) during the sentencing phase of a capital trial.\textsuperscript{175} No longer must a judge or jury, in compliance with the specific language of section 532.025(3), find a statutory aggravating circumstance as listed in section 532.025(2). If a judge permits the introduction of a circumstance different than those listed, but "authorized by law," then according to \textit{Harris}, the jury could sentence the defendant to death having found only that additional circumstance's existence. Future "arbitrary" and "capricious" administration of the death penalty becomes a current concern in light of the \textit{Harris} court's interpretation of section 532.025.\textsuperscript{176}

Finally, another effect of this interpretation of section 532.025 is the potential for prosecutors to misuse it as a tool for plea bargaining. Where a defendant is charged with murder or kidnapping, but sufficient evidence that any of the circumstances as listed in subsection two is lacking, the prosecutor could use the \textit{Harris} decision to encourage the defendant to plea to a lesser sentence. Relying on the vague language of "authorized by law,"\textsuperscript{177} the prosecutor could seek a plea bargain with the defendant by raising the prospect that the defendant could receive the death penalty or life without possibility of parole for twenty-five years.\textsuperscript{178} Thus, the defendant could suffer from potential "scare tactics." Ultimately, \textit{Harris} could jeopardize the integrity of Kentucky's entire judicial system.


\footnotesize{\textsuperscript{175} See \textit{FINAL REPORT AND RECOMMENDATIONS}, supra note 158, at 81 ("The framework and many of the sentencing provisions of the Code are incompatible with each other and with the sentencing philosophy being pursued by decision and policy makers. The whole system needs to be reviewed, rethought, and restructured . . . .").}


\footnotesize{\textsuperscript{177} See \textit{K.R.S. § 532.025(2)}.}

HARRIS V. COMMONWEALTH

VII. CONCLUSION

Harris is not a current case. However, the importance of studying this decision is evident in light of its impact on Kentucky's legal system. While this case is over eight years old, it is still the law in Kentucky and serves as an important precedent for judges in sentencing. The Supreme Court of Kentucky should revisit its holding in Harris that interprets the introductory language of Kentucky Revised Statutes section 532.025(2) to allow a judge or jury to find an aggravating circumstance outside of those listed in section 532.025(2)(a). Furthermore, the Kentucky General Assembly should clarify this language to eliminate any inconsistency in the statute's interpretation and application. Should the General Assembly decide to revise the Kentucky Penal Code, it is important to consider the inconsistency with which the court has interpreted section 532.025. The Kentucky legislature should also consider the principles set forth in Gregg and draft a new section which is clear on its face in its interpretation and application to avoid a future constitutional challenge that the law is "arbitrary," "capricious," or vague.

179 See Harris v. Commonwealth, 793 S.W.2d 802, 805 (Ky. 1990).