Arguements at sentencing Both sides

if he or she realizes. The knowing aggravated battery. Knowing that some type of great bodily harm or disfigurement, creates and imminent danger to another person, was reasonably certain to result from his actions. This definition of recklessness is so close to what is required under the knowing aggravated battery.

I believe that there's sufficient evidence for the reckless because, yes, he knew that he was consuming a controlled substance; the controlled substance the State classifies as an inherently dangerous controlled substance. So if the State classifies that substance as inherently dangerous, he realizes that he's taking an inherently dangerous controlled substance and he's unjustifiably disregarding the risk of either danger to himself or danger to another person. That's that argument.

The attempted voluntary manslaughter. The State had responded that there really was no evidence of either heat of passion, an unreasonable belief that you were acting in self defense, or --

MR. BREITENBACH: Sudden quarrel.

MR. WHITE: Right. Sudden quarrel. And yes, those are three specific types of factual situations that we will reduce a degree of homicide when there is

This whole section is at my sentencing. Notice that my lawye is all of the sudden bringing up things that he never mentione at my trial when it actually mattered... He waited until my ~~sent~~ sentencing, when it would make no difference, but to the people witnessing this, it would appear that pg 80 he had addressed these issues

an intent to kill or an attempt of an intent to kill. But the definitions in the cases cited by the State generally are forms of provocation. And I had taken those -- that language from those cases -- granted a sudden quarrel here, no. That didn't happen.

A sudden quarrel, in its traditional sense, because the fact is the evidence showed that Matt was inside the house, he had the knife in his hand, he put it down. Some time had passed. He then picked it up. There was nothing mentioned by Andrew at that point and then Matt just went after Andrew. No. That's not a sudden quarrel.

Is it a heat of passion? Well, the definition of provocation in all these cases is provocation is adequate if calculated to deprive a reasonable man of self control and to cause him to act out of passion rather than reason. It's an objective test and it can be some other form of provocation, and that's what I'm saying that this fits into. It's that some other form of provocation must be sufficient to cause an ordinary man to lose control of his actions and his reasonings.

So did the ingestion of whatever this drug was -- and I don't really believe there is any dispute about the drug, did that cause Matt to lose his self control concerning his actions and reasonings? I think we can

all agree, yes.

It's the distribution by Andrew Langston of the inherently dangerous controlled substance that caused Matt to lose control of his actions and his reasoning. I'm not saying that Matt should not take responsibility for his voluntary ingestion of that substance. What I'm saying is that it is fundamentally fair to truly consider Andrew Langston's part in this. In that, the State considers and defines that substance as quote, an inherently dangerous substance, then that distribution is a form of provocation. It's dangerous in and of itself. And clearly the factual situation shows that Matt lost his self control.

I put in the motion that Matt was controlled by the controlled substance. I don't think there's any question about that. It's simply going to be up to you to determine whether or not you think that was a sufficient other form of provocation, sufficient to give a jury instruction on attempted voluntary manslaughter.

Moving on, a new case came out after the verdict, and that was in *State versus Hobbs*, and I had it cited in the supplemental motion No. 107667. It was decided January 16, 2015, prior to the jury instruction conference. And this was off the record, but I think

I'm so glad you're saying all this now when it doesn't matter. Good job Mr. White, you were so wort the 10 r is gran you stol from my moth

that everyone will remember this. We were discussing the problems with this culpable state of mind statute as it related to a defendant's theory of defense, stating that a defendant always has a due process right to present his theory of the defense if there's evidence to support that. And I think that we could all agree with that. But when the statutes enacted appear to limit that ability, then I think that we're going to start having problems. That -- I believe that this *Hobbs* case is illustrative of that.

Because with the enactment of the new statutes they are now saying that in that case that the State has to prove the knowing culpable state of mind, whatever it is, for each and every element of the offense unless that specific criminal offense statute directs otherwise. Quote, we regard our current overall statutory framework as more similar to that in Illinois and to that in Nebraska. Like Kansas statutes, Illinois statutes define the various culpable mental state and require: If the statute of the offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element.

The jury instructions that we had appeared to only

They did not & I've proven this!

have said that the State has to prove that knowing culpable state of mind as a element not that it has to prove that culpable state of mind with regard to each element.

The *Hobbs* court then did a factual analysis. Although they found that the jury instructions were inadequate, they said, was there evidentiary support? Was there actual proof of that? And in this case they found that they did. But what they were requiring is that there had to be some knowing culpable state of mind concerning the result that would happen. Not just that he had the culpable state of mind, but that he had to have it with the result. So that appears to say that he has to know what the result is going to be.

I don't know if that's really possible given the actual state of mind that he was really in and his lack of self control in his actions and reasonings. (I understand the State has its theory, but I think when everyone associated with the investigation of it, the various comments of the medical personnel, the law enforcement officers, the witnesses saying he's psychotic, I've never seen him act this way, he had incredible strength -- everyone believed that he was obviously under the -- something of a hallucinogenic drug. I'm going to leave that to you.)

? What?

So in that situation I think that even in the *Hobbs* case there is a sufficiency of the evidence issue concerning each of the various elements of both attempted first degree murder and the alternative charge of aggravated battery. Because the jury instructions that we gave the jury doesn't say that you have to have that culpable state of mind concerning each and every element. I don't really know how the courts are going to deal with that, but it is what it is.

Of course, the jury instruction analysis, and I know that you know what it is, is in reviewing a court's firmly convinced that there's a real possibility that the jury would have returned a different verdict if the instruction had been given. I just don't know. I don't know.

The due process analysis. Again, the lesser-included offense doctrine a couple of decades ago was more of a double jeopardy analysis and we had the various lesser-included offense statutes that would say it's either, it's included, or it's a lesser degree of it, or it's necessarily proven by the evidence even though there may have been a different element in each of the crimes. We're still going to find that to be a lesser-included and then we attach the term

multiplicity, because with double jeopardy you can't be convicted twice for the same conduct, punished twice for the same conduct, or split criminal behavior deriving from a single episode into different points.

That changed briefly with the new statutes. But the State in its response I think is focusing on a double jeopardy analysis. There's really -- I really can't find a case like this one. We have a jury that has convicted the defendant of both the defendant's theory, as I requested, and the State's theory.

Now, there are cases out there that do discuss that when you are convicted of alternative charges then it's a multiplicity argument and it is a double jeopardy argument. And in that situation the State is going to be entitled to the more severe punishment at sentencing. Everyone agrees that he can't be convicted of both. Everyone agrees with that. And that would be the rule if there wasn't a new statute. And I'm not arguing that there's a double jeopardy violation as long as the Court dismisses one of the alternative charges. I think that we all agree that whichever one it is that's going to occur. My argument is that it is a due process violation. I think that we can agree that in fundamental terms, this isn't a procedural due process right, it's a substantive right. It's the

why?

fundamental fairness.

As a general doctrine under due process we know that criminal defendants have the right to be charged and convicted and sentenced of the more specific offense as opposed to the general offense. And in response to my motion the State said there is no case law, there is no statutory support for the proposition that I'm proposing. I disagree. There is. And it is in the motion for new trial.

It is paragraph number six and specifically -- excuse me. Page six, paragraph number 22. K.S.A. 21-5109(d) provides: Unless otherwise provided by law, when crimes differ only in that one is designed to prohibited the designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant: one, may not be convicted of two crimes based on the same conduct. That's the double jeopardy analysis. That's -- I think we can all agree. But it's the second portion that provides the support. And two, shall be sentenced according to the terms of the more specific crime.

The old case law that discusses the multiplicity sentencing aspect is done in the context of the old lesser-included offense doctrine. So we have column A and we have column B. We've got lesser-included

offenses in column A, column B. On top of that -- layered on top of that you have a double jeopardy analysis. That would be subsection (1). He clearly can't be convicted of both or sentenced for both.

But then on top of that we have the due process analysis. He can only be sentenced to the more specific crime. The legislature chose these words very clearly and I've placed these in the motion for this reason. Look at paragraph number 19 on the same page, the giving of lesser-included instructions is not a matter of discretion with the trial court. K.S.A. 22-3414(3) directs that where there is some evidence which would reasonably justify a conviction of some lesser-included crime, blah, blah, blah. We use lesser-included crime.

The courts and the statutes are using the language of the legislature in lesser-included crimes. We know that the legislature knows what it's doing when it uses that word in a lesser-included analysis. If the legislature in subsection (2) of 21-5109(d) meant to make that a lesser-included analysis they would have used that analysis there. They would have said something to the effect of, shall be sentenced according to the terms of the more severe punishment, or the greater crime, or the greater punishment. But

they chose to use the words specific and general.

There is statutory authority for this argument that he should only be sentenced for the more specific crime. In getting to that analysis yes, there is a case out there that talks about someone in an alternative charge could be convicted of the attempted first degree and aggravated battery and, yes, the State is entitled to that more severe punishment. That's an old lesser-included case. This statute was not in effect at that time. There is not a case that I can find that addresses this, because, clearly, I don't believe that this factual and legal situation has ever occurred before. And if it has, then it wasn't appealed and we just don't know about it.

But giving that we're really dealing with new territory here, when I put in the motion well, I think that the only way that we can answer that question is to have had the jury answer that specific question. That special question should have been submitted to the jury. Maybe if this gets appealed the State's appellate argument would be well, the defendant didn't make that argument after the verdict and they would be entitled that. And the defense is going to make the same argument, neither did the State.

So if there's any failure, I think it's the

failure on all of our part not to perhaps forecast this situation. Whatever failure there is in that situation the rule of lenity is going to be in favor of Mr. Wimberly on that. I do not believe that the Court has the authority, with all respect, to make that determination because when he invoked his right to a jury trial we're trying to determine what the jury's intent was in convicting him of both charges.

To me that blows my mind because it should have been one or the other. I mean, that's classically how the alternative charing theory really works. But they came back for both for some reason. So without determining what the jury's intent was in convicting him in both, without determining what the jury's findings would be concerning which they considered to be more specific, if you find that you have the authority to make that determination -- how can you really make that determination because then you would be reweighing the evidence and that would invade the providence of the jury.

I understand that the State may couch this in terms of a legal issue, I just don't think it's a legal issue. So that is what that is.

Sufficiency of the evidence. I'm really not going to get too much into that, Judge. Really I'm kind of

relying mainly on what I've already put into the motions and things like that. I just don't want to get into that.

Theory of the defense. I want to address this briefly here before I address it more fully in the motion for departure. As we all know I was prohibited from making some arguments before the jury concerning the full acceptance of responsibility, issuance of an apology to both the Court, Mr. Langston's family, Mr. Wimberly's family. Also Mr. Wimberly was prohibited from testifying to certain things. And in an off the record conversation between all of us the State did say, you know, that's really more of a sentencing issue, it goes more towards mitigation. I think it goes to both. But the reason why I think it's important to bring it up here is because when acceptance of responsibility is argued as a nonstatutory factor in a departure, there is case law to say that when a defendant doesn't truly and fully accept responsibility during the trial, during statements -- during PSI statements, after the fact that he really is not accepting responsibility.

So part of that is if he would have entered a plea of no contest, case law says that's not full acceptance of responsibility. If he would have made a statement

in the PSI kind of saying you know what, I really didn't do this. That's not accepting full responsibility. A third of our defense theory was acceptance of responsibility. A second third of it was the overcharging analysis. He's not guilty of the attempted first degree murder. He's guilty of the aggravated battery. The third part of it is fair. We just want to do what's fair.

He will accept responsibility for what he truly did but not for what he didn't do. But at the same time he should be allowed to put before the jury and we were to a limited degree, Andrew's participation in this. And I will get more into that -- his participation in this in the motion for departure. But given that the due process right to present your theory of the defense that is part and parcel in my opinion with the specific general analysis.

There you have it.

THE COURT: All right. Did you want to make any argument on the motion for judgment of acquittal before we hear from the State or do you want to reserve argument for later?

MR. WHITE: Later.

THE COURT: Okay. Mr. Breitenbach?

MR. BREITENBACH: Thank you, Your Honor.

I'm going to try and go in a similar order here as much as I can. Obviously, I would incorporate the written response and arguments made at the time of trial on a lot of these issues.

As far as the statute that ranks various mental states and says that if a higher one is proven, the lesser ones necessarily are proven, a couple of responses.

One, I would perhaps suggest to the Court that all the arguments about aggravated battery maybe just kind of be set to the side for now because if the Court accepts the verdict on Count 1, all of that argument becomes moot. So I'm not going to be spending a lot of time on the agg. battery analysis, and that's what some of this goes to is, well, you know, he should have been entitled to reckless because there was no -- that's all in column B, so to speak, and I frankly don't know that we're going to need to worry about that. But I would submit that this statute, it's somewhat of a -- if the State over proves their case, you know, if they show intentional -- you know it would not be a defense it was a reckless act for a defendant to say well, the State didn't prove reckless conduct, they proved intentional conduct so my client is not guilty. You know, it's that kind of a thing which clearly flies in

a voluntary manslaughter. It doesn't apply to create you know some other perfect defense. Rather -- because that's what involuntary intoxication does. You know, involuntary intoxication could be a perfect defense, but voluntary intoxication as it has been applied so far would be a defense to a specific state of mind. The jury rejected that and found the defendant guilty of Count 1. And, again, the Court has the evidence.

Given the statements of the defendant of his intention to harm, his actions to do so, and the depths to which he followed that intent it's hard to say that there's insufficient evidence for the jury to have reached that verdict.

There was the argument that his ingestion was a reckless act. Again, the voluntary intoxication statute and case law govern how that act is to be handled by the jury. The *Hobbs* case, I'm aware of that case. Candidly, I hope the Supreme Court -- I expect that they will refine that going forward. It would be hard to imagine a situation where a defendant could say, I didn't know I was in Sedgwick County and therefore I'm not guilty of this crime. I didn't intend to -- I didn't have a specific intent to kill someone on, you know, April 22nd, therefore I'm not guilty of this crime. Clearly there are elements that

require intent and those that do not and I would expect that as that case is further elaborated on in the future that will become clear.

But to the extent that it is what it is now, looking at Count 1, the jury -- there was a mens rea for each element. You know, the attempt has it's own specific intent and they were instructed on what that meant. Premeditation was specifically defined and the jury had to find that. The intent to kill had to be present and it was specifically defined.

So given the verdict of this case I would argue that *Hobbs* has actually been complied with to the extent that it needs to because each element that the jury found him to have done set forth the type of mental thought process that had to be present at the time. So I would not suggest that *Hobbs* should be an issue for the Court.

As far as -- well, and just a little editorial, I feel I should say again, the defendant says that he took this substance, that he received it from Andrew, but ultimately the jury rejected that whatever substance he may or may not have taken prevented him from having the requisite mens rea. So to say that the parties agree that he was controlled by the drug or that, you know, the parties agree that somehow he's not

* Because it was never appropriately, adequately or conclusively explained.

responsible -- that's not -- I won't say that; that's not what counsel said, but I think it was the parties agreement that the defendant was under the influence of this drug. That issue never really became necessary for the jury to decide. What they had to decide is if he was under the influence, was it to a certain degree.

It's possible that they rejected it out of hand and didn't think that he was under the influence of anything. Now, I'm not saying they did or didn't make that determination, but to say that the evidence is just overwhelming that he took it and it was the drug when that question is not having to be resolved. The specific versus general, you know, the State cited cases where this exact verdict form occurred with the two alternatives and how the Court proceeded, as the Court should here, which is to affirm the verdict on Count 1 and sentence accordingly, and dismiss Count 2.

But further I would argue, as I did in the motion, that the more specific crime is Count 1. "You know, it's not for the jury to decide well, which would you like to be punished for." Because I think, kind of, what the argument that's being offered is well, you tell us which one you think feels better or fits the facts better. They found that both acts were proven and there's nothing inconsistent about that.

Right of Jury Nullification

In an attempt to kill someone, someone would be knowingly causing at least great bodily harm. So there's nothing inconsistent. But ultimately, if the Court feels it has to make that determination about a more specific crime, clearly the one with the additional elements that have been met which is the intent to kill with premeditation would be the more specific crime than the more general crime of just causing great bodily harm to someone. So to the extent that the Court feels it needs to make that analysis, attempted first degree murder is the more specific crime.

And then as far as the theory of the defense, candidly I would submit that two-thirds of the theory, in all due respect, were probably not appropriate; right? I mean, what's fair -- I hate to say this but what's fair and what's legally and factually supported can be two totally different things. So to acknowledge that part of the play was just what's fair, you know, this other guy did something wrong too so take that into account when deciding what my guy did, well, you know, as was mentioned in chambers, you know, during the trial, the State would equate that to a nullification argument, which does happen. We understand that. But to say that the defendant has an

absolute right to argue nullification I think would be contrary to what the law is.

Further, the concern that he's not getting credit for full acceptance of responsibility, well, again, the defendant can plead guilty. That is his choice. His choice to proceed to trail inherently is some lesser acceptance of responsibility. If the defendant really believed he was guilty of the aggravated battery and that alone, he could have plead guilty to Count 2. He chose not to. And, again, that's his right as well. I don't mean to suggest that he did anything wrong by exercising his right to trial, but this argument that he should have gotten every ounce of benefit of acceptance of responsibility while in the midst of a trial where he's denying culpability for the crimes that the jury has arguably -- not arguably but has clearly found are supported, I think is a little hard to justify.

Clearly, the part of the defense about how the case was overcharged, that the aggravated battery is a more appropriate charge that was fully flushed out for the jury and to the extent that any limits were placed on these other parts of the defense, they were only in accordance to the rules of evidence, which were also to the case law that talks about the defendant being

I was never offered this choice.

What?

entitled to present his defense, you know, clearly indicate that that's not at the expense of the rules of evidence and the Court rightly walked the line. Let some things in, kept some things out. And we would argue that the Court did so appropriately. I believe that's all I have at this time unless the Court has questions. Thank you.

THE COURT: Rebuttal, then, Mr. White?

MR. WHITE: Very briefly.

Mr. Breitenbach just mentioned that he didn't think that voluntary intoxication was ever a defense to a general intent crime. What I mean by that is that aggravated battery used to be a specific intent crime and it was a defense to that. Then they recodified it and made it a general intent crime. That's that comment.

Two, the distribution. The comment was made that the only evidence in the record came from Mr. Wimberly. That's inaccurate. Justin Malter, Jonmark Herrscher testified that they saw the distribution, they saw the exchange. They knew that that had happened. There's other evidence.

Three, the *Hobbs* case. When Mr. Breitenbach is arguing well, there isn't in these other elements but the illustration that he gave is well do we have to

argued all the way through the trial and it just seems to me that the jury, by convicting Mr. Wimberly of the offense of attempted murder in the first degree, that they considered and rejected the voluntary intoxication defense. Which necessarily means that the jury found that if Mr. Wimberly was intoxicated, his intoxication was not to the degree that it impaired his mental faculties to the extent that he was incapable of forming the necessary premeditated intent to kill. And so I think that having found that is, you know, the jury's verdict is what it is. They're the finders of fact and they resolved that fact question adverse to Mr. Wimberly.

I believe I have proven otherwise with this new information

With respect to the attempted -- failure of the Court to give the attempted voluntary manslaughter, this was argued on the record at trial and the Court -- I haven't changed my mind on the rulings that were made at trial and would incorporate those rulings here. The argument that I don't believe I addressed at the time of trial was the argument on provocation and that Mr. Langston provoked the attack by providing Mr. Wimberly with drugs that were dangerous mind altering hallucinogenic drugs. And it seems to me that although I'm somewhat in agreement with Mr. White on the interpretation of provocation and some other form of

provocation, it seems to me that what was intended there was a certain flexibility in terms of different fact patterns that could come into play that may not fit neatly into heat of passion or neatly into one of the three. That there should be some flexibility there. But it seems to me that the whole concept of provocation is the victim must provoke in some form or fashion the attack on himself and I don't know that the act of giving or providing Mr. Wimberly with dangerous drugs necessarily leads to a provocation of an attack on Mr. Langston. I suppose depending upon whether Mr. Langston was there or not or you know who knows.

Ultimately the theory of the defense is that Mr. Wimberly was not acting in his appropriate frame of mind and so I don't know that -- I suppose to the degree that Mr. Langston created a dangerous circumstance by giving Mr. Wimberly the drugs -- I don't think that you can draw the conclusion that that dangerous environment was a provocation of an attack on himself as opposed to just creating a dangerous environment in general.

So it seems to me that even if I grant Mr. White some flexibility in terms of arguing some other form of provocation, I mean, you have to still get back to the fact that whatever that is, the victim has to provoke

everything that's in the motion. I'm not going to speak about everything. In the motion for departure there are going -- we're going to ask for both a dispositional and a durational departure. I'm going to give you some options at the end. I'm going to briefly discuss some statutory factors and then some non statutory factors.

In looking at K.S.A. 21-6815(c)(1), that lists the five statutory factors I believe that apply to this case. Subsection big A, the victim participated in the criminal conduct associated with the crime of conviction. Subsection big B, the offender participated under circumstances of duress and compulsion. This factor may be considered when it is not sufficient as a complete defense. And then subsection C, the offender, because of mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs, alcohol does not fall within the purview of this factor.

In speaking about subsection A, there's no question that Andrew Langston participated in an inherently dangerous felony. He distributed that controlled substance. That is not just supported by Matt Wimberly's sole statement, that's supported by two

other objective witnesses. It happened. We all know it happened. That does not mean that that is in and of itself a complete defense. We'd acknowledge that. But certainly the legislature has indicated through this statutory factor that when a victim, like Andrew, participates in a criminal activity, it's only fair to take that into account specifically at a sentencing.

Now, whatever it was that was distributed to Mr. Wimberly we really don't know. I think that probably Andrew at least knew it was some type of LSD. I think that Matt Wimberly probably assumed it was some type of LSD. I suspect that because it didn't come up as LSD, that it was the N-bomb drug that is being circulated around Wichita. There's simply not a test for that right now. Whatever it was it definitely had control of Matt Wimberly. Thats great Mr. White that you finally mention this after my trial was over, and waited till my sentencing.

Now, Mr. Langston, and I'm sorry that you have to hear this because I know as a grandmother you're going to love your grandchildren and I respect that; I do. But he participated in this. The fact, in addition to that, is that we agreed before trial that Mr. Langston's pending drug case down at the juvenile facility would not be put before the jury. We also agreed that Matt's suspected drug use and acknowledged drug use would not go before the jury. But it doesn't

mean that those things can't be considered now.

The fact of the matter is is that when this occurred Andrew Langston -- you can take judicial notice of this under 60-409, the court files -- he had been arrested for marijuana. He was going to court that next day down at Sedgwick County District Court, and here he is out on bond distributing not marijuana, he says it wasn't marijuana even though in some statement he said that that was there, but an inherently dangerous drug. It's not in and off itself a complete defense. But you cannot deny that he has to assume some responsibility for his own actions here. That's the reason why our legislature said that that's inherently dangerous. He engaged in that, and that is part and parcel of this. I know that it's hard to hear that, but it happened.

I think of a civil liability context. Things like product liability. If I have a product and I'm selling that product and either I know that it is a dangerous or defective product or I should know that it is a dangerous or a defective product and I distribute that product to a buyer, yeah, sometimes, and many times, the buyer sees the risk. But it doesn't relieve the seller, the distributor of liability. He's got to be held accountable for that.

In and of itself I think that that is a statutory factor that is substantial and compelling.

Under subsection B, Defendant participated under circumstances of duress and compulsion. Not in the traditional sense of duress and compulsion, but I think that the facts amply illustrate that whatever it was controlled Matthew Wimberly. Duress and compulsion means that you really -- you've got to do something. You're not in self control. Granted, it may not rise to the level of provocation for an attempted voluntary manslaughter element to reduce the degree of homicide, but it is a form of provocation, like the Court said.

That was distributed to Mr. Wimberly, and I have illustrated this. There's an agreement between both Matt and Andrew here. They engaged in an inherently dangerous activity, both of them did. To say that this is completely Matt's fault and he should be the sole responsible party for this, I just don't think is reasonable because they both engaged in it. Andrew is not going to get any criminal liability out of this. Andrew's case down in juvenile wasn't affected by this case. He was never charged with the distribution in this case. Granted, he is suffering physically. He is suffering mentally. Just like Matt Wimberly. So yeah, there's some duress and compulsion there. I think that

even if you don't consider that to be in and of itself sufficient, I think when you combine that with subsection big A, that that would be sufficient.

Subsection big C, if you find, Judge, that subsection B does not apply, in other words this voluntary intoxication that he engaged in under subsection B, if you find that B doesn't apply, then I believe that subsection C is unconstitutional on the facts of this case because it says the voluntary use of intoxicants is not a factor that can be used. But when you look at the voluntary intoxication statute at 21-5205(b) other state of mind language it says that it can be used, at least as a partial defense for the underlying action. So to say if it can be used as a defense for the underlying action but then can't be used as a mitigating factor, that just doesn't make sense.

And then to say okay, if it can't be used as some type of defense in the underlying action and still can't be used as a mitigating factor at sentencing, I think that's unreasonable. Because now you're saying that when the law allows a defendant some type of voluntary intoxication defense mitigation, we're going to treat those people differently than a non-intoxicated defense mitigating factor. You're not

treating them the same. Here you're saying that someone who really suffers from a mental impairment is going to be penalized for that intoxicated state that the legislature says should be taken as a defense. Perhaps not a complete justification or excuse, but should be considered. So there's got to be some reasoning between B and C there.

The point is subsection A focuses on the beginning of the transaction. That's Andrew Langston's part. Subsections B and C focus on the other end of the transaction. That's Mr. Wimberly's part. That's the distinction that we're trying to make. Surely this intoxication has to be used for mitigation at some point.

Paragraph seven, you've already ruled concerning the specific and general analysis, and I accept your ruling, but I just believe that that can be used, again, if not in and of itself as a nonstatutory factor, at least when you start combing these all together and look at the totality of the circumstances that there is a substantial and compelling environment here that would say, you know what, this is not the typical attempted first degree murder. There's obviously situations here that are definitely out of the ordinary.

Lack of danger. I know that counsel and the Court have received and reviewed the various letters of support. I put some phrases in there I just -- I know that you've read the motion. I'm not going to go through it, but I believe that there is a lot of statements in there that show he's not a danger to the public.

The acceptance of responsibility. In the motion for new trial I was arguing that I would complete this analysis in the motion for departure. And this is where the Court's say, you know what, if you don't give a full admission of guilt, we're just not going to give you any benefit to that. In the federal system you are permitted under the federal guidelines a two-level reduction for acceptance of responsibility. They actually penalize you for going to trial. But there is some sense in that in that. Although it may not be a complete defense or a partial defense, at least the federal system says when you accept responsibility we're going to take that into account. We're dropping you two levels. That's automatic. That's not even discretionary with the judge. Now, the judge can depart farther from that and give a third level of acceptance of responsibility or vary from the sentencing guidelines in addition if there are

substantial and compelling reasons.

But whatever factor you have, I think that you can consider that. And, again, what we were trying to do there is make sure that there was a full acceptance of responsibility. And so now we're going to definitely incorporate his statement here apologizing to the Court, apologizing to Mr. Langston's family, his own family and also the State. I mean, clearly both of them -- we wouldn't be here had both of them not done this. In this case $249,000 in restitution, the amount of time that the prosecution has spent on this, the court system, the defense, that's a lot of cost. Fairness, I believe, you take in account both their actions here. Just don't place it all on Mr. Wimberly.

The supportive family and character letters, I have those listed out by name. Again, that's going to be incorporated. I'm not going to -- I know you've read them.

There is another factor here. At various points in time courts will look at the actual conduct. If you look at the actual conduct, that gives rise to a criminal charge. And even in the federal system you look at post offense rehabilitation, post offense conduct, acceptance of responsibility. And we even do that in the state system as well.

(CRUX) This says it all!

But in this particular fact I want to focus on Andrew Langston. Andrew Langston was told by the District Attorney's Office we want you to be honest here about this drug use, about this distribution because there are other witnesses that said that you did this. Just don't be afraid, you know. But he continued to deny that. So when he gets up here on the stand and denies that, I'm going to call it what it is. I don't believe him. I believe he perjured himself. It doesn't mean that that is a complete defense. It does mean that it is a mitigating factor. All he had to do was say yes, I did it. But he didn't. He continues to deny it.

The other nonstatutory factors I've put in there, so I ask that you consider those as well.

It doesn't mean that I do not have compassion for Andrew Langston. I do. But I have compassion for Matt Wimberly as well. They're both wrong. Granted, Matt, in my opinion, did something even more wrong and he's paying the consequence for that. He's getting a conviction out of this. But I think in all fairness -- if fairness isn't allowed to be used during the trial phase, fairness should be used in the sentencing phase to look at all the facts, find substantial and compelling reasons to depart.

Now, here are some options. Mr. Wimberly wants me to ask for a dispositional departure. And I discussed this with him and I believe to date he's been in custody around 19 months, somewhere around that point. The State is asking for a 195-month standard sentence.

Option number one would be to depart dispositionally, impose the underlying sentence requested by the State and hang that over his head.

Option number two would be to not depart dispositionally but to depart durationally. What do I think is a fair sentence? Option number two, Judge, I'm going to request that you sentence him in the range of an aggravated battery severity level 4 criminal history G which would be 47, 50 and 52 months.

There's not question that a consequence of this case, regardless of what happens in an appeal or not, Mr. Wimberly is going to get a felony conviction out of this that's going to be there probably for the rest of his life and it may very well be the attempted first degree murder. The factual consequences, the legal consequences, his ability not to do things in the future is greatly going to be hampered by that. You can calling it splitting the baby if you want to. But if you convict him, which you have, of the attempted first degree murder but sentence him to an aggravated