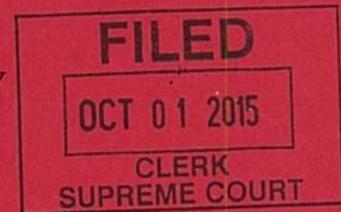


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2014-SC-000468-DG



LEON M. GRIDER

APPELLANT

ON REVIEW FROM THE COURT OF APPEALS  
NO. 2011-CA-002003  
ADAIR CIRCUIT COURT NO. 05-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

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BRIEF FOR APPELLANT  
LEON M. GRIDER

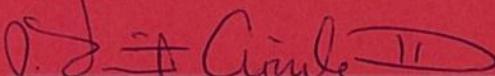
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CERTIFICATE OF SERVICE:

The undersigned does hereby certify that copies of this brief for appellant were served upon the following named individuals, by mail, first class postage prepaid, on the 30th day of September 2015: Hon. James Bowling, c/o Hon. Judy D. Vance, Judge, Adair Circuit Court, 201 Campbellsville Street, Suite 299, Columbia, Kentucky 42728; Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and Hon. Gail Williams, Commonwealth's Attorney, 29<sup>th</sup> Judicial Circuit, 116 Campbellsville Street, Suite 3, Columbia, Kentucky 42728. The undersigned does also certify that the record on appeal has not been removed from the office of the Clerk of this Court.

  
\_\_\_\_\_  
J. VINCENT APRILE II

## **INTRODUCTION**

Leon Grider, a pharmacist, who was seventy-five years old at the time of trial, was convicted by a jury in Adair Circuit Court of first degree trafficking in a controlled substance in the first degree, first offense, a violation of KRS 218A.1412, a Class C felony, and was sentenced to nine (9) years of imprisonment, which was probated for five (5) years. Police Chief Irvin, a prosecution witness, while being cross-examined, in a non-responsive answer informed the jury that Leah Wilson, a confidential informant, had worked with him “[o]n other trafficking cases involving Mr. Grider in Russell County,” even though the trial court had ruled pretrial that “no other” alleged drug transactions that occurred in Russell County, Kentucky could be introduced. The defense moved for a mistrial, but the trial judge denied that motion. Mr. Grider was indicted on September 13, 2005, and was tried from August 8, 2011 through August 11, 2011.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Leon M. Grider desires oral argument before this Court because this appeal presents the important question of, when a defense counsel has taken necessary and adequate steps prior to trial to insure that the prosecution witnesses do not inject allegations of uncharged misconduct into a trial, may an experienced law enforcement officer, with full knowledge of the ruling, circumvent that ruling with impunity when the jury will view the offending witness as a reliable source for the inadmissible information. Oral argument will allow this Court through dialogue with appellant’s counsel and the Commonwealth to ensure that the proper resolution of this assigned error is made with full regard to the impact of the error on Leon Grider’s right to a fair trial.

## CITATIONS TO THE RECORD

The following abbreviations are used within in citing to the record on appeal:

TR I	Transcript of Record (Volume One)
App.	Appendix to the Brief
CD	CD-R

## STATEMENT OF POINTS AND AUTHORITIES

<b>STATEMENT OF THE CASE</b> .....	1-6
<b>ARGUMENT</b> .....	6-41
<b>THE TRIAL COURT ERRED TO APPELLANT GRIDER’S SUBSTANTIAL PREJUDICE AND DENIED HIM DUE PROCESS BY DENYING THE DEFENSE MOTION FOR A MISTRIAL AND INSTEAD CHOOSING TO ADMONISH THE JURY TO DISREGARD THE TESTIMONY OF THE CHIEF OF POLICE REGARDING OTHER CRIMINAL INVESTIGATIONS OF THE APPELLANT INVOLVING THE INFORMANT IN THIS CASE AND DRUG TRAFFICKING, WHEN SUCH EVIDENCE HAD BEEN PRECLUDED BY THE TRIAL COURT ON A MOTION IN LIMINE AND THE POLICE CHIEF WAS PRESENT WHEN THAT RULING WAS ANNOUNCED</b> .....	6-41
CR 76.12(4)(c)(v) .....	6
<b>The Pretrial Ruling</b> .....	6-9
Kentucky Rule of Evidence 103(d) .....	7
Kentucky Rule of Evidence 404(b) .....	7
Kentucky Rule of Evidence 403 .....	7
<i>Clark v. Commonwealth</i> , 223 S.W.3d 90 (Ky. 2007) .....	8, 15
<i>O'Bryan v. Commonwealth</i> , 634 S.W.2d 153 (Ky.1982) .....	9, 15
<b>The Error Occurs</b> .....	9-10
<i>Greer v. Miller</i> , 483 US 756 (1987) .....	10, 11

<b>Standard of Review for Mistrials</b> .....	10-11
<i>Woodard v. Commonwealth</i> , 147 S.W. 3d 63 (Ky. 2004) .....	10, 39, 40, 41
<i>Bray v. Commonwealth</i> , 68 S.W.3d 375 (Ky. 2002) .....	10
<i>Goodyear Tire and Rubber Co. v. Thompson</i> , 11 S.W.3d 575 (Ky. 2000) .....	10
<i>Miller v. Eldridge</i> , 146 S.W.3d 909 (Ky. 2004) .....	10
<i>Zervos v. Verizon New York, Inc.</i> , 252 F.3d 163 (2 <sup>nd</sup> Cir. 2001) .....	10, 11
<i>Skaggs v. Commonwealth</i> , 694 SW 2d 672 (Ky. 1985) .....	11
<i>Wiley v. Commonwealth</i> , 575 S.W.2d 166 (Ky. App. 1979) .....	11
<b>Standard of Review for Admonitions</b> .....	11
<i>Krulewitch v. United States</i> , 336 US 440 (1949) .....	11
<i>Bruton v. United States</i> , 391 U.S. 123 (1968) .....	11
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964) .....	11
<i>Johnson v. Commonwealth</i> , 105 S.W.3d 430 (Ky. 2003) .....	<i>passim</i>
<i>Alexander v. Commonwealth</i> , 862 S.W.2d 856 (Ky. 1993) .....	11
<i>Stringer v. Commonwealth</i> , 956 S.W.2d 883 (Ky. 1997) .....	11
<b>The Trial Court’s Ruling</b> .....	11-15
<i>Derossett v. Commonwealth</i> , 867 S.W.2d 195 (Ky. 1993) .....	12
<i>Bowler v. Commonwealth</i> , 558 S.W.2d 169 (Ky. 1977) .....	12
<i>Leon M. Grider v. Commonwealth</i> , unpublished opinion, Court of Appeals, No. 2011-CA-002003-MR, March 7, 2014 .....	<i>passim</i>
<i>Commonwealth v. Leon Grider</i> , unpublished opinion, Court of Appeals, No. 2009-CA-002080, August 12, 2011 .....	13
Kentucky Rule of Evidence 201(d) .....	13, 17

<i>Collins v. Combs</i> , 320 SW 3d 669 (Ky. 2010) .....	13
<i>Nailing Your Direct Examination</i> , Marsha Hunter, American Bar Association, Section of Litigation, December 3, 2012 .....	14
<b>The Right to be Tried on Only the Crime Charged</b> .....	15-16
Kentucky Revised Statute 218A.1412 .....	16
<i>Maxie v. Commonwealth</i> , 82 S.W.3d 860 (Ky. 2002) .....	16, 19
<b>The Jury Knew Crimes in Russell County Would Not Be Tried in Adair County</b> .....	16-17
<b>To the Jury, Chief Irvin was a Reliable Source for Information About Uncharged Offenses</b> .....	17-20
<b>The Jury Was Free to Speculate About the “Other Trafficking Cases”</b> .....	20
<b>Past Performance, Present Behavior</b> .....	20-21
<i>Encyclopedia of Industrial and Organizational Psychology</i> , Steven G. Rogelberg, Editor, Sage Publications (2006) .....	21
<b>The Similarities Between Chief Irvin’s Inadmissible Information and the Charge Before the Jury</b> .....	21-23
<i>Phillips v. Commonwealth</i> , 679 S.W.2d 235 (Ky. 1984) .....	22, 40
<b>The Prosecutor Failed to Take Steps to Caution His Witnesses Not to Violate the Pretrial Order</b> .....	23-24
Standard 2-10.4, <i>Witness Interviewing and Preparation</i> , National District Attorneys Association, National Prosecution Standards (3 <sup>rd</sup> Ed.) .....	23
Kentucky Rule of Professional Conduct 3.8, Commentary (1); SCR 3.130 .....	24
<b>Chief Irvin Was Aware of the Pretrial Ruling That Barred Any Reference to Other Alleged Drug Transactions in Russell County</b> .....	24-25

<b>Chief Irvin’s Reference to the Inadmissible Evidence Was Intentional and Calculated to Bolster the Prosecution’s Case</b> .....	25-26
<b>The Jury’s Sentencing Recommendation is an Indicator of the Ineffectiveness of the Admonition</b> .....	26
<b>An Admonition is Insufficient as a Matter of Policy When an Experienced Police Officer Violates a Pretrial Order Banning the Admission of Uncharged Misconduct</b> .....	26-27
<i>Sandez v. United States</i> , 239 F. 2d 239 (9 <sup>th</sup> Cir. 1956) .....	27
<i>Dunn v. United States</i> , 307 F. 2d 883 (5 <sup>th</sup> Cir. 1962) .....	27
<i>Wright v. State</i> , 325 P.2d 1089 (Okl. Cr. 1958) .....	27
<b>Deficiencies in the Prosecution’s Case</b> .....	27-28
<b>The Confidential Informant’s Credibility Was in Doubt</b> .....	28-29
Kentucky Rule of Evidence 608(b)(1) .....	28
<i>Bratcher v. Commonwealth</i> , 151 SW 3d 332, 343 (Ky. 2004) .....	29
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974) .....	29
<b>The Face of the Perpetrator is Not Visible in the Video Recording of the Transaction</b> .....	29-30
<b>The Law Enforcement Officers in the Area When the Transaction Occurred Did Not See Either the Perpetrator or the Perpetrator’s Vehicle</b> .....	30-31
<b>Officer Rogers’ Testimony that Mr. Grider’s Attire on the Day in Question was the Same as the Attire of the Perpetrator in the Video of the Transaction Was Inconsistent With His Statements as Recorded in the Uniform Offense Report</b> .....	31-34
<i>Oxford Pocket Dictionary and Thesaurus, American Edition</i> , Oxford University Press, 1997 .....	33

<b>The Police’s Audio Recordings of the Confidential Informant’s Phone Call Allegedly Made to Mr. Grider Requesting Delivery of the Controlled Substance Were Virtually Inaudible</b> .....	34-35
<i>Sanborn v. Commonwealth</i> , 754 SW 2d 534 (Ky. 1988) .....	35
<i>United States v. Robinson</i> , 707 F.2d 872 (6th Cir.1983) .....	35
<b>The Jury Was Reminded of These Factors</b> .....	35
<b>The Evidentiary Harpoon</b> .....	35-37
<i>Gregory v. United States</i> , 369 F.2d 185 (D.C. Cir. 1966) .....	36
<i>Kirby v. State</i> , 774 N.E.2d 523 (Ind. Ct. App. 2002) .....	36
<i>Wright v. State</i> , 325 P.2d 1089 (Okl. Cr. 1958) .....	36
<i>Perez v. State</i> , 728 N.E.2d 234 (Ind. Ct. App. 2000) .....	36
<i>Anderson v. State</i> , 704 P. 2d 499 (Okl. Cr. 1985) .....	37
<i>Bruner v. State</i> , 612 P.2d 1375 (Okl. Cr. 1980) .....	37
<b>Psychological Theory and Admonitions</b> .....	37-39
Madelyn Chortek, <i>The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials</i> , 32 Review of Litigation 117 (Winter 2013) .....	37, 38, 39
<i>U.S. v. Kentucky Bar Ass’n</i> , 439 SW 3d 136 (Ky. 2014) .....	37
Christine Jolls, Cass R. Sunstein & Richard Thaler, <i>A Behavior Approach to Law and Economics</i> , 50 Stanford Law Review 1471 (1998) .....	37
Joel D. Lieberman and Bruce D. Sales, <i>What Social Science Teaches Us About the Jury Instruction Process</i> , 3 Psychology, Public Policy, and Law 589 (December, 1997) .....	38
Daniel M. Wegner, <i>Ironic Processes of Mental Control</i> , Psychological Review, Vol. 101, No. 1, 34 (1994) .....	38

Richard M. Wenzlaff & Daniel M. Wegner,  
*Thought Suppression*, 51 Annual Review of Psychology 59 (2000) ..... 38

**Mr. Grider Was Denied His Constitutional Right to Due Process of Law** ..... 39-40

United States Constitution, Amendment XIV. .... 39

Kentucky Constitution, § 2. .... 39

*Estelle v. Williams*, 425 US 501 (1976) ..... 40

**A Mistrial Was Mandated** ..... 40-41

**Conclusion** ..... 41

## STATEMENT OF THE CASE

On August 23, 2005, appellant, Leon M. Grider, was indicted in the Adair Circuit Court on one count of trafficking in a controlled substance in the first degree, first offense, a violation of KRS 21A.1412, a Class C felony, and one count of trafficking in a controlled substance in the third degree, first offense, a violation of KRS 218A.1414, a Class A misdemeanor. [Indictment, Transcript of Record, Volume I (TR I), 1-2.] On May 30, 2006, the misdemeanor count was dismissed. [TR I, 46.]

With the jury trial scheduled for Monday, August 8, 2011, the Chief Senior Judge for the Region entered an order on Tuesday, August 2, 2011 assigning Honorable James L. Bowling, Jr., Senior Judge, as Special Judge for the trial. The order was not filed in Adair Circuit Court or received by counsel until Friday, August 5, 2011, the last business day before the trial was to commence. [Order Assigning Special Judge; TR IV, 519-520.]

Mr. Grider was at the time of the offense a pharmacist and owner of three drug stores with pharmacies in Russell Springs, Russell County, Kentucky – Grider Drugs #1, Grider Drugs # 2 and Grider Drugs-Key Village.

Prior to June 4, 2004 Kentucky State Police Detective Scott Hammond, working in Drug Enforcement Special Investigations, received a complaint from the Kentucky Board of Pharmacy concerning the Grider Drug Stores. [CD; 08/09/11;10:06:45 & 10:13:19-14:30.]

Detective Hammond contacted the Chief of the Russell Springs Police Department, Joe Michael Irvin, to assist him in his investigation.

As part of this investigation, Detective Hammond and Chief Irvin used a young woman named Leah Wilson as a confidential informant. [CD; 08/09/11; 10:15:20-10:18:05.]

By her own admission, Leah Wilson, while working as a confidential informant in this case, was a drug addict and a paid informant, who continued to sell illegally controlled substances. [CD; 08/10/11; 09:36:58-10:38:40.]

Ms. Wilson lived in a mobile home in a fairly remote area of Adair County, which is adjacent to Russell County, Kentucky. [CD; 08/09/11:10:20:05-21:25; 10:24:10.]

On June 4, 2004, Leah Wilson, at the direction of Detective Hammond, supposedly telephoned Leon Grider a couple of times and asked him to bring her four or five methadone pills. [CD; 08/09/11; 10:30:19-43.] The officers first attempted to set up in Wilson's mobile home the recording equipment that Joey Hoover, Chief, Jamestown Police Department, had brought, but it failed to work. [CD; 08/09/11; 10:32:55-33:11.] The officers then placed a video recorder under a chair angled toward the door where a person would enter Leah Wilson's trailer. [CD; 08/09/11; 10:50:22-51:00.]

The three law enforcement officers, Hammond, Irvin and Joey Hoover, who were all at Leah Wilson's mobile home in Adair County on June 4, 2004, in anticipation of Leon Grider's expected arrival, went down the road from the mobile home and hid in a secluded, wooded area. [CD; 08/09/11; 10:25:45-10:26:10; 10:32:12.] As a result, none of the officers present at Leah Wilson's mobile home were in a position to identify either the vehicle that drove up to the mobile home or the person who exited the vehicle and entered the mobile home. No photos of the vehicle or its driver were taken outside the mobile home. None of the officers could testify as to the make, model and year of the vehicle or even give the license plate number on the vehicle. None of the officers viewed the driver as he left the mobile home, entered the vehicle and drove away. None of the officers saw the vehicle as

it drove away from Leah Wilson's residence.

The recording does contain audio and video of an unidentifiable person handing Leah Wilson what appears to be a distributor's bottle of 100 methadone pills and a taped up strip of paper containing sixty (60) Xanax. [CD; 08/09/11; 10:51:15-10:52:10.] The person in the video recording with Leah Wilson cannot be identified because the video footage never shows the face of that person, always ending at the neck of that person. As a result, only Leah Wilson, the paid confidential informant, testified that the person in the recording at her mobile home was Leon Grider. None of the police officers could corroborate her identification.

The person in the recording does not ask Leah Wilson for either payment or a prescription. Upon his arrival, the person in the recording asks that if Leah is afraid, does she want him to stay. Upon his departure, the person in the recording asks do you want me to stay the night.

As part of their plan, Hammond and Irvin assigned another law enforcement agent, Jamie Rogers, a member of the Russell Springs Police Department, to conduct surveillance on Leon Grider during the day and evening of June 4, 2004. [CD; 08/09/11; 10:31:27-43.] Although at one point Rogers lost surveillance on Mr. Grider, he was able to testify that the last time he saw Mr. Grider driving, Grider was in Russell County on a road that could have taken him toward Adair County and Leah Wilson's mobile home. However, on that road Leon Grider had numerous opportunities to take other roads that would not have taken him in the direction of Adair County and Leah Wilson's mobile home. [CD; 08/09/11; 01:54:17-2:13:58; 02:13:58-16:16.]

Jamie Rogers testified at trial that on June 4, 2004 Leon Grider was wearing the same color pants and shirt as the person in the video recording at Leah Wilson's mobile home that evening. However, the police report that Rogers filed in 2004 described Leon Grider as wearing a shirt and pants different from both his trial testimony and the person in the video recording. [CD; 08/09/11; 02:13:58-16:16.]

During defense counsel's cross-examination, the witness, Chief Irvin, in an unresponsive answer, blurted out that Leah Wilson had worked for him as a confidential informant "on the other trafficking cases involving Mr. Grider in Russell County." [CD; 08/09/11; 01:19:17-26.] The prosecution was under the trial court's pretrial order that evidence of the charges pending in Russell County against Mr. Grider was not admissible in this trial. Chief Irvin was present in the courtroom when that ruling was announced. The trial judge denied defense counsel's timely motion for a mistrial.

The prosecution was allowed to play, over defense objection, an excerpt from a video deposition of Leon Grider in *Leon and Anna Mae Grider v. City of Russell Springs, Kentucky, et al.*, U. S. District Court, Western District of Kentucky, Bowling Green Division, that was conducted on May 20, 2011. [CD; 08/10/11; 11:23:45-29:30; Commonwealth's Exhibit #14.] In the course of the deposition, Leon Grider states that he did deliver some prescriptions to Leah Wilson, but not controlled substances and not methadone. In response to the questioning, Leon Grider appears to discuss both going to Leah Wilson's residence and what he had seen on an evidence tape provided the defense through discovery showing the alleged transaction.

The jury trial lasted four days from August 8, 2011 through August 11, 2011. Leon

Grider was convicted by a jury of trafficking in a controlled substance in the first degree, first offense, a violation of KRS 218A.1412, a Class C felony, and was sentenced, in accordance with the jury's recommendation, to nine (9) years of imprisonment, which was probated for five (5) years. [Judgment and Sentence on Jury Verdict and Order of Probation; TR V, 645-649; App., 15-18.]

A timely appeal was filed to the Kentucky Court of Appeals. Oral argument was held on March 27, 2013 and the opinion affirming the conviction and sentence was rendered on March 7, 2014.

The Court of Appeals "believe[d] that the admonition given the jury cured the testimony of Chief Irvin referencing other criminal investigations involving Grider and, thus, the court did not err in denying his motion for a mistrial." *Leon M. Grider v. Commonwealth of Kentucky, unpublished opinion*, Kentucky Court of Appeals, No. 2011-CA-002003-MR, March 7, 2014, Master Slip Opinion (M/S Op.), p. 12; App., 12. The Court of Appeals followed this statement with a recitation of the general principles of law applicable to both mistrials and admonitions, but did not specifically address any of the factual circumstances surrounding Chief Irvin's inadmissible reference to the confidential informant working for him "on other trafficking cases involving Mr. Grider in Russell County." *Id.*, M/S Op. at pp. 12-14; App., 12-14. Concluding its analysis of this assigned error, the Court of Appeals emphasized its belief that "*sub judice* the error created by the admission of Chief Irvin's testimony was cured by the admonition given the jury" and, "[a]ccordingly, the court did not err in denying the motion for a mistrial." *Id.*, at p. 14; App. 14.]

On March 28, 2014, Mr. Grider filed a timely petition for rehearing that was denied, without elaboration, on July 17, 2014. On August 29, 2014, this Court granted Mr. Grider's timely motion for an extension of time to and including Monday, September 15, 2014, in which to file his discretionary review motion. Mr. Grider filed a timely motion for discretionary review on September 15, 2014, pursuant to CR 76.40(2), that this Court granted on June 3, 2015. This Court specifically limited the grant of discretionary review as follows:

The motion for review of the decision of the Court of Appeals is granted only on the issue of whether the trial court erred in choosing to admonish the jury to disregard the testimony of the Chief of Police regarding other criminal investigations of the Defendant involving the informant in this case, after such evidence had been precluded by the trial court on a motion in limine. The motion for discretionary review is denied with respect to all other issues.

[Order, 06/03/2015.]

This appeal follows.

#### ARGUMENT

**THE TRIAL COURT ERRED TO APPELLANT GRIDER'S SUBSTANTIAL PREJUDICE AND DENIED HIM DUE PROCESS BY DENYING THE DEFENSE MOTION FOR A MISTRIAL AND INSTEAD CHOOSING TO ADMONISH THE JURY TO DISREGARD THE TESTIMONY OF THE CHIEF OF POLICE REGARDING OTHER CRIMINAL INVESTIGATIONS OF THE APPELLANT INVOLVING THE INFORMANT IN THIS CASE AND DRUG TRAFFICKING, WHEN SUCH EVIDENCE HAD BEEN PRECLUDED BY THE TRIAL COURT ON A MOTION IN LIMINE AND THE POLICE CHIEF WAS PRESENT WHEN THAT RULING WAS ANNOUNCED.<sup>1</sup>**

**The Pretrial Ruling.** On August 8, 2011, prior to the selection of the jury, appellant

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<sup>1</sup>

This issue was preserved by defense counsel's timely motion for a mistrial made immediately following the witness's unresponsive answer and when counsel informed the court that the giving of his requested admonition did not waive his mistrial motion. [CD; 08/09/11; 01:20:55; 01:27:03.] CR 76.12(4)(c)(v).

Grider had filed a motion in limine, pursuant to KRE 103(d),<sup>2</sup> to exclude, pursuant to a KRE 404(b)<sup>3</sup> and 403,<sup>4</sup> the prosecution's evidence of other crimes, wrongs, or acts not alleged in the indictment. [TR IV, 536-541.]

On Friday, July 29, 2011, the prosecutor had sent an e-mail to Mr. Grider's counsel that stated in part:

As you are aware, pursuant to KRE 404(b), by letter sent in March 2006, I previously notified Hon. Jeff Hoover & Hon. Patrick Nash of my intentions to offer certain evidence of other crimes /bad acts during the trial of Leon Grider in Adair County. Please be advised that I plan to offer some evidence of the Russell County transactions involving Leah Wilson, Phillip Grider, and Leon Grider, and I may also offer evidence of the transaction involving Pamela Lawless and Leon Grider. I believe that the Russell County transactions are (at least) indicative of identity, preparation, plan, and absence of mistake and I also believe that the Russell County transactions are so inextricably intertwined with other evidence essential to the case that the evidence must be presented during the Adair County trial. I feel that this evidence is admissible pursuant to KRE 404(b)(1) & (2). This notice of my intent to introduce evidence would also apply to the alprazolam that was delivered by Mr. Grider along with the methadone in Adair County on June 4, 2004. I realize that the trafficking charge related to the alprazolam has

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2

"Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine." Kentucky Rule of Evidence (KRE) 103(d), *Rulings on evidence*.

3

"Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." KRE 404(b), *Character evidence and evidence of other crimes*.

4

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403, *Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time*.

been dismissed, but I intend to offer evidence of the transfer of the alprazolam during my case in chief, pursuant to KRE 404(b)(2).

[Mr. Grider's 404(b) Motion, p. 2; TR IV, 537; E-Mail, Dated Friday, July 29, 2011, 10:17 a.m.]

At the hearing on the motion held before jury selection on August 8, 2011, the trial judge ruled that the alprazolam misdemeanor count, which was dismissed from the indictment more than a year earlier, would be admissible because it was mentioned on the recording of the transaction involving the felony methadone transfer. The judge also ruled that any other transfers of drugs mentioned on the recordings would be admissible as would be the amount of cash Mr. Grider had allegedly given the confidential informant, Leah Wilson, which was also mentioned on the recording in question. However, the court below ruled that "no other" alleged drug transactions involving appellant Grider that occurred in Russell County, Kentucky could be introduced. [CD; 08/08/11; 10:30:37-37:56.]

The video recording of the hearing on the 404(b) motion reflects that in the audience in the courtroom, directly behind the prosecution's table, sat Joe Michael Irvin, Chief of the Russell Springs Police Department, observing the arguments of counsel and the trial judge's rulings. [CD; 08/08/11; 10:30:38-10:37:56.]

KRE 404(b) provides that evidence of other crimes, wrongs, or acts is inadmissible to establish the character of a defendant in order to show action in conformity therewith. This type of evidence is generally inadmissible because an accused has the right to have his case tried for only the particular charged crime. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). "KRE 404(b) is 'exclusionary in nature,' and as such, 'any exceptions to the general

rule that evidence of prior bad acts is inadmissible should be closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.” *Id.* at 96, quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky.1982). The trial court’s pretrial order banning the introduction of other trafficking transactions involving Mr. Grider in Russell County enforced this legal principle.

**The Error Occurs.** During defense counsel’s cross-examination of Chief Irvin, the following exchange occurred:

Q: Did Leah Wilson ever work for you as a confidential informant – directly for you?

A: On the other trafficking cases involving Mr. Grider in Russell County.

[CD; 08/09/11; 01:19:17-26.]

On hearing the unresponsive answer from Chief Irvin, which informed the jury of alleged criminal trafficking transactions in an adjacent county, uncharged in this case, in violation of the trial court’s pretrial ruling, defense counsel immediately approached the bench and moved for a mistrial, stating “I want a mistrial.” [CD; 08/09/11; 01:20:55.]

The trial judge in response stated that he agreed that defense counsel didn’t exactly open the door, but the question was open-ended enough for Chief Irvin’s answer to be a truthful response. [CD; 08/09/11; 01:19:56.]

However, the trial judge stated that he “didn’t think this rises to a mistrial.” [CD;08/09/11; 01:20:55.] The judge added that he would admonish the jury.

Defense counsel drafted an admonition for the court to give to the jury that read:

There was an objection to the Chief’s response and I would admonish you to

disregard his response to that question and I remind you that we are here to determine ... one offense and one offense only.

[CD: 08/09/11; 01:26:50.]

The trial court gave the requested admonition.

Defense counsel thereafter told the court “I want to show on the record that my admonition request does not waive my mistrial” request, which the judge had denied.<sup>5</sup> [CD; 08/09/11; 01:27:03.]

**Standard of Review for Mistrials.** “It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion.” *Woodard v. Commonwealth*, 147 S.W. 3d 63, 68 (Ky. 2004), citing *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). “[A]buse of discretion applies in ... situations where, for example, a ‘court is empowered to make a decision – of *its* choosing – that falls within a range of permissible decisions.’” *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004), quoting approvingly *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2<sup>nd</sup> Cir. 2001); (emphasis in *Zervos*).

“[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a ‘manifest necessity for such an action.’”

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“Once it became apparent that the judge was not going to grant a mistrial, it was the duty of counsel to determine what strategy was in his client's best interest.” *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987).

*Woodard, supra* at 68. “The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.” *Id.* “In order for a mistrial, there must appear in the record ‘a manifest necessity for such an action or an urgent or real necessity.’” *Skaggs v. Commonwealth*, 694 SW 2d 672, 678 (Ky. 1985), quoting *Wiley v. Commonwealth*, 575 S.W.2d 166 (Ky. App. 1979).

**Standard of Review for Admonitions.** The criteria, applicable to this case, “in which the presumptive efficacy of an admonition<sup>6</sup> falters” is “when there is an overwhelming probability that the jury will be unable to follow the court’s admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant.” *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), citing *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky. 1993), overruled on other grounds by *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997). *Greer v. Miller*, 483 US 756, 766 n.8 (1987).

**The Trial Court’s Ruling.** In rejecting the defense motion for a mistrial, the trial judge, after noting that defense counsel did not “exactly open the door” for the witness’s answer, erroneously found that the question was “open-ended” enough in an apparent effort to justify the response given. [CD; 08/09/11; 01:19:58-20:06.] The trial judge also noted that

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*Contra Krulewitch v. United States*, 336 US 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury, [citation omitted,] all practicing lawyers know to be unmitigated fiction.”), quoted in, e.g., *Bruton v. United States*, 391 U.S. 123, 129 (1968), and *Jackson v. Denno*, 378 U.S. 368, 388 n.15 (1964).

it was a “truthful response,” as if the injection of correct, but inadmissible, evidence made the error nonprejudicial. [CD; 08/09/11; 01:20:06-36.]

The trial judge’s reference to “a truthful response” appears to misapply the legal principle that an admonition will be insufficient “when the question was asked without a factual basis and was ‘inflammatory’ or ‘highly prejudicial.’” *Johnson v. Commonwealth*, *supra*, 441. That principle is inapplicable to the situation under review. It applies when the examiner asks a highly prejudicial question, without a factual predicate and without regard for the answer, solely to inject inadmissible, inflammatory evidence into the case. In that situation, an admonition will not be sufficient to cure the error. See *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993); *Bowler v. Commonwealth*, 558 S.W.2d 169, 171 (Ky. 1977). That is obviously not the situation at bar.

When uncharged misconduct is erroneously introduced into evidence, the error is not cured because the inadmissible information was correct. A “truthful response” is not a panacea for contaminating the trial with inadmissible evidence. If so, then a prosecutor could simply inject uncharged misconduct into a case, in contravention of a judge’s ruling, and defend its admission on the grounds that the information was accurate. The trial judge’s reference to a “truthful response” was not a legitimate basis for denying a mistrial.<sup>7</sup>

Parenthetically, the trial judge was aware before the jury trial began that the charges

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It is unclear whether the Court of Appeals made a similar mistake in its analysis of this claim. The Court of Appeals did acknowledge that “an admonition is insufficient” when “the question had no factual basis and was inflammatory or highly prejudicial,” citing *Johnson v. Commonwealth*, *supra*, 441. *Grider v. Commonwealth*, unpublished opinion, No. 2011-CA-002003-MR, March 7, 2014, M/S Op., p. 13; App., 13.

of drug trafficking in Russell County had been dismissed without prejudice and that the trial court's dismissal was on appeal at the time of Mr. Grider's Adair Circuit Court trial. [CD; 08/08/11; 10:30:40-49.] See *Commonwealth v. Leon Grider*, unpublished opinion, Court of Appeals, Case No. 2009-CA-002080, August 12, 2011, (finality 04/26/2012). KRE 201(d); *Collins v. Combs*, 320 SW 3d 669, 678 (Ky. 2010).

However, the judge did acknowledge that Chief Irvin's answer was "getting into areas he is not supposed to." [CD; 08/09/11; 01:20:06-36.] This was an acknowledgment by the court that Chief Irvin's comment violated the pretrial order precluding the admissibility of other drug transactions by Mr. Grider in Russell County. Similarly, the judge stated that the witness's answer "was on the edge of dirty pool," but the judge did not "think" he "cross it" because the defense question was "open-ended enough." [CD; 08/09/11; 01:22:40-55.]

Defense counsel's question – "Did Leah Wilson ever work for you as a confidential informant – directly for you?" – called for a simple yes or no answer and did not seek details, examples or any other specifics of when Leah Wilson had worked for Chief Irvin as a confidential informant. This was not an open-ended question<sup>8</sup> that opened the door for Chief Irvin to provide this information. There is no other formulation of this question that could have been more closed-ended than this question. The question did not ask "on what other cases did Leah Wilson ever work directly for you as a confidential informant?"<sup>9</sup> But that is

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An *open-ended question* is designed to encourage a full, meaningful answer using the subject's own knowledge and/or feelings. It is the opposite of a *closed-ended question*, which anticipates and encourages a short or single-word answer.

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"Open-ended questions begin with one of seven interrogative words: 'who,' 'what,'

the question Chief Irvin answered, even though it was never asked. Regardless of how the actual question that was asked is parsed, it called for a “yes” or “no” answer, not the inadmissible evidence that Chief Irvin spewed out.

Additionally, not only was defense counsel’s question closed-ended, but defense counsel had the right to believe that the prosecutor had informed his witnesses of the trial judge’s pretrial ruling excluding evidence of the trafficking charges in Russell County or that the prosecution witnesses, such as Chief Irvin, were otherwise aware of the ruling as they were present when the court issued its ruling. In that same vein, the prosecutor informed the court that he did not talk to his witnesses about the pretrial ruling on the excluded evidence because those witnesses, including Chief Irvin, were in the court for the hearing on the 404(b) motion and heard the court’s ruling. [CD; 08/09/11; 01:20:35-48.]

Chief Irvin’s unresponsive answer injecting multiple uncharged drug trafficking cases into the trial appears to be either intentional or at the least a wantonly negligent act by a seasoned, experienced law enforcement officer. Chief Irvin was present in the courtroom during the pretrial hearing on the admissibility of evidence pertaining to evidence the charges against Mr. Grider in Russell County and heard the judge rule that evidence of those charges were inadmissible. The prosecutor, after acknowledging that he had not informed his witnesses either individually or in a group of the court’s pretrial ruling, excused this by noting that Chief Irvin had been present in the courtroom during the hearing on the

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‘when,’ ‘where,’ ‘why,’ ‘which,’ and ‘how.’” *Nailing Your Direct Examination*, Marsha Hunter, American Bar Association, Section of Litigation, December 3, 2012, <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/fall2012-1112-nailing-direct-examination.html>.

uncharged misconduct and heard the judge's ruling. The prosecutor obviously believed that Chief Irvin was well aware that no mention was to be made of evidence pertaining to the pending charges in Russell County. [CD; 08/09/11; 01:20:35-48.] If the prosecutor was entitled to rely on Chief Irvin being aware of the court's pretrial ruling because Irvin was present when the ruling was announced, then obviously defense counsel was entitled to assume Chief Irvin was aware of this restriction on his testimony.

Under these circumstances, Irvin's blurt appears either intentional or, at the least, wantonly negligent.

The inability of an admonition to protect Leon Grider from Chief Irvin's prejudicial injection of "other trafficking cases involving Mr. Grider in Russell County" is manifest and necessitated the granting of a mistrial.

**The Right to be Tried on Only the Crime Charged.** Mr. Grider was charged with and was being tried for only a *single* drug trafficking charge. [Indictment, TR I, 1-2.] "Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense. . . . The rule is based on the fundamental demands of justice and fair play." *Clark, supra* at 96, quoting *O'Bryan, supra* at 156. Yet, after Chief Irvin's comment the jury was under the impression that Mr. Grider had engaged in other drug trafficking incidents in Russell County that were being either investigated or prosecuted by the police. Chief Irvin referenced "other trafficking cases involving Mr. Grider in Russell County," indicating that Mr. Grider had *committed* or was *suspected of committing multiple trafficking offenses* in the adjacent county. No longer was Mr. Grider a pharmacist charged

with a single illegal transfer of a controlled substance, he was in the jurors' minds, after Chief Irvin's comment, at the least suspected of being a drug trafficker who engaged in multiple illegal transactions in two separate counties.

The charge against Mr. Grider was one count of "trafficking in a controlled substance in the first degree, first offense," KRS 218A.1412. [TR I, 1-2.] The benefit of being tried on a single charge is that the jury should be under the impression that this is the only time Mr. Grider has trafficked in a controlled substance and the jury would have been under that impression, but for Chief Irvin's inflammatory remark.

The nature of the inadmissible information injected into the trial is an important factor in determining whether a mistrial is required. In *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002), a prospective juror, during voir dire in the presence of the venire panel, stated, "I cannot be impartial when it comes to somebody that has those charges brought against them. In my opinion if the Commonwealth of Kentucky and the investigating officers didn't have proof we wouldn't be here today." In that scenario, the prospective juror did not state any actual factual information, but only expressed his generic, erroneous personal opinion about how the criminal justice system works. This is completely different from an experienced police officer testifying under oath about "other trafficking cases involving Mr. Grider in Russell County," a factual statement addressing a specific situation personal to Mr. Grider that would appear correct and credible to the jurors.

**The Jury Knew Crimes in Russell County Would Not Be Tried in Adair County.**

As these "other trafficking cases" were referenced as Russell County cases, the jury could understand why those trafficking charges were not being heard by them in Adair County.

Because Chief Irvin said “the other trafficking cases involving Mr. Grider were in Russell County,” the jury would undoubtedly assume that factor was the reason those other cases were not being prosecuted in this case in Adair Circuit Court.

Russell Springs, where Joe Michael Irvin is the Police Chief, is in Russell County, which is adjacent to Adair County, where the offense being tried allegedly occurred. Russell Springs is some thirteen miles by car from Columbia, Kentucky, where Mr. Grider’s trial took place. KRS 201(d); see MapQuest at <http://www.mapquest.com/#efb5a2b73694185cae8c4edb>.

Russell County is in a different judicial district than Adair County; Adair County has a different Commonwealth’s Attorney than Russell County. The jury would have understood that “other trafficking cases” in Russell County could not be prosecuted in Adair Circuit Court and would understand why those other charges were not being tried in this case.

As a result, the jurors would have no reason to believe that the “other trafficking cases involving Mr. Grider in Russell County” had been resolved favorably to Mr. Grider. Nothing in Chief Irvin’s recitation of the inadmissible information mitigated its prejudicial impact.

**To the Jury, Chief Irvin was a Reliable Source for Information About Uncharged Offenses.** Joe Michael Irvin, as the Russell County Police Chief, would appear to be *a reliable source* for this information about “other trafficking cases involving Mr. Grider in Russell County.” Because the witness who injected this information about these other trafficking cases involving Mr. Grider in Russell County was introduced to the jury on direct examination as the Chief of the Russell Springs Police Department in Russell County,

the jury was certain to credit him as a credible, reliable source for the information he blurted out. [CD; 08/09/11; 01:05:14-06:52.]

At the inception of his direct examination of Joe Michael Irvin, the prosecutor elicited that Mr. Irvin was at present the Chief of Police of Russell Springs, Kentucky and had occupied that position since December 2000, a period of almost eleven years. [CD; 08/09/11; 01:05:13.] Chief Irvin had been a uniform officer in the Russell Springs Police Department since July 27, 1996. Chief Irvin explained that, after graduating high school in 1985, he had joined the United States Army and served in the Military Police Corps. After leaving the Army, Chief Irvin had attended college for six years, earning degrees in police administration and psychology, a “double major.” Upon graduation from college in 1996, he had joined the Russell Springs Police Department. In his capacity as police chief, Mr. Irvin over the years has supervised a police department of usually seven officers and one civilian. [CD; 08/09/11; 01:05:13-6:51.]

Chief Irvin was presented as a law enforcement officer with fifteen years of experience with the Russell Springs Police Department and almost eleven years as the chief of that department. Additionally, Chief Irvin was credited with an unspecified number of years as a military police officer in the United States Army. His academic achievement in police administration was also emphasized. All of these qualifications were no doubt true and admissible evidence. However, those particular credentials must be factored into the equation when evaluating how much credence the jury would give to Chief Irvin’s unsolicited reference to the “other trafficking cases involving Mr. Grider in Russell County.” The answer is simple. The jury would have trusted Chief Irvin’s comment about the other

trafficking cases as accurate and reliable. This would make it extremely difficult for the jurors simply to disregard this labeling of Mr. Grider as a drug trafficker involved in multiple cases in multiple counties, even after hearing the admonition.

At the inception of his guilt phase closing argument, the prosecutor emphasized to the jury that “there were law enforcement officers who testified for the Commonwealth that were involved in this investigation and their experience totals sixty-six years.” [CD; 08/11/11; 01:38-48.] Although fair comment by the prosecutor, the reference to “sixty-six years” of police experience of which over half belonged to Chief Irvin, occurring shortly before deliberations on Mr. Grider’s guilt or innocence of the one charge, would have reminded the jury that Chief Irvin, as an experienced police officer, should be trusted in what he said, including his comment about “other trafficking cases involving Mr. Grider in Russell County.”

The reliability of the source of the prejudicial information injected into a jury trial is important in determining whether a mistrial is appropriate. In *Maxie, supra*, 863, the source of the objectionable comments was a prospective juror, who made his remarks during voir dire, albeit in the presence of the venire panel. In that situation, the trial judge in the admonition told the jury that the judge had never seen that venireperson “in any trial, ... involved in any criminal case, so I don’t want you to think he is an insider that knows how this works, because I don’t believe that he is.” *Id.* In that situation, the *Maxie* court found “the detailed curative admonition given by the trial court provided a legally sufficient remedy.” *Id.*

Obviously, the jury in Mr. Grider’s trial could not be admonished that Chief Irvin had

never been involved in a criminal case and was not an insider who knows how criminal investigations work.

The jurors' perception of the credibility and reliability of the witness who volunteered the inadmissible evidence is an important factor in determining whether an admonition can remedy the introduction of such evidence. The jury's view of Chief Irvin as an experienced and successful law enforcement officer made his recitation of this inadmissible evidence of such character and magnitude that Mr. Grider would be denied a fair and impartial trial and that prejudicial effect could not be remedied by an admonition or any option other than a mistrial.

**The Jury Was Free to Speculate About the "Other Trafficking Cases."** Chief Irvin's reference to "other trafficking cases involving Mr. Grider in Russell County" allowed the jury to speculate that Mr. Grider had been *convicted* of other trafficking offenses, although in another county. "Cases" could refer to ongoing investigations, completed investigations, convictions or any combination thereof.

Prior to Chief Irvin's comment about Mr. Grider's other trafficking offenses in Russell County, the jury had heard both Detective Hammond and Chief Irvin discuss on direct examination the investigation of Mr. Grider on the Adair County trafficking offense, including using Leah Wilson as a confidential informant, that resulted in this trial. [CD; 08/09/11; 10:05:20-57:08; 01:05:10-01:14:21.] In this context, it is probable that the jury would assume that similar investigations of "other trafficking cases" in Russell County had resulted in the filing of charges there as well.

**Past Performance, Present Behavior.** Many people ascribe to the belief that past

performance or behavior is the best predictor of future behavior, particularly in a similar situation.<sup>10</sup> This adage is often reduced to a simpler version: he did it before, he must have done it again. This type of thinking is a major reason why uncharged misconduct is universally precluded by evidence rules. Regardless of whether the principle that past performance is the best predictor of future behavior is generally correct or incorrect, the reality that it can be incorrect in individual situations requires that past misconduct should not be allowed to contaminate a jury's deliberations, absent special situations or circumstances.

There is no reason to doubt that individual members of Leon Grider's jury believed in the essence of the precept past behavior is the best predictor of future behavior, regardless of how it was articulated in their thinking. Once exposed to Chief Irvin's sworn testimony referencing "other trafficking cases involving Mr. Grider in Russell County," jurors who believe past behavior is the best predictor of future conduct would have considered this information compelling evidence of Mr. Grider's guilt of the single charge of drug trafficking in Adair County.

**The Similarities Between Chief Irvin's Inadmissible Information and the Charge Before the Jury.** Chief Irvin's reference to "other trafficking cases involving Mr. Grider in Russell County" was in response to the question "Did Leah Wilson ever work for you as a confidential informant – directly for you?" As a result, the jury was informed that

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"In psychology, there is a common belief that the best predictor of future performance is past performance." *Encyclopedia of Industrial and Organizational Psychology*, Steven G. Rogelberg, Editor, Sage Publications (2006), p. 455.

this confidential informant, Leah Wilson, worked for Chief Irvin in more than one “trafficking case” in Russell County involving Leon Grider. The jury had already learned by the time Chief Irvin made this inadmissible statement that Leon Grider was being tried for the offense of trafficking in a controlled substance being investigated by Chief Irvin and Detective Hammond using Leah Wilson as their confidential informant. The only differences between the uncharged misconduct in Chief Irvin’s statement and the case being tried was that the uncharged misconduct occurred in Russell County, not Adair County, and there was more than one trafficking case in Russell County. The two situations were essentially the same, making it extremely easy for the jurors to credit Chief Irvin’s inadmissible information as compelling evidence of Mr. Grider’s guilt of the charged offense before them.

This situation is markedly different from the injection of inadmissible evidence of uncharged misconduct distinct and different from the charged offense being tried. See, *e.g.*, *Phillips v. Commonwealth*, 679 S.W.2d 235, 237-238 (Ky. 1984) (in a jury trial for burglary, receiving stolen property and rape, inadmissible evidence of the accused’s escape from jail was erroneously introduced, but did not require a mistrial).

Chief Irvin’s reference to the cases in Russell County did not contain any type of time frame. However, the similarities between the two situations would cause the jurors to believe that the incidents in both counties occurred within a relatively short time frame. This would cause the jury to give greater weight to this information than if the inadmissible reference had been to a prior conviction even for a similar crime committed many years earlier.

Under these circumstances, the jury would be hard pressed not to give great credence to Chief Irvin's reference to inadmissible information.

**The Prosecutor Failed to Take Steps to Caution His Witnesses Not to Violate the Pretrial Order.** By his own admission, the prosecutor had not cautioned his law enforcement witnesses about the court's pretrial ruling that references to other trafficking cases involving Mr. Grider in Russell County would not be permitted. [CD; 08/09/11; 01:20:35-48.] This is difficult to understand. On July 29, 2011, ten days before the trial began, the prosecutor in an e-mail had advised defense counsel that he "plan[ned] to offer some evidence of the Russell County transactions involving Leah Wilson, Phillip Grider, and Leon Grider, and that he "may also offer evidence of the transaction involving Pamela Lawless and Leon Grider." [Mr. Grider's 404(b) Motion, p. 2; TR IV, 537; E-Mail, Dated Friday, July 29, 2011, 10:17 a.m.] The prosecutor did not learn until Monday morning, August 8, 2011, prior to jury selection, that no evidence of the Russell County transactions would be admissible. In this context, the prosecutor would have most likely prepped his witnesses, particularly the law enforcement officers, about testifying about the Russell County trafficking cases in accordance with the prosecution pretrial strategy.<sup>11</sup> Yet, the prosecutor admittedly did nothing to reinforce with his witnesses prior to them taking the stand that the planned testimony about the Russell County trafficking cases was now off

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"The prosecutor may *discuss the content*, style, and manner of the witness's testimony, but should at all times make efforts to ensure that the witness understands his or her obligation to testify truthfully." Standard 2-10.4, *Witness Interviewing and Preparation*, National District Attorneys Association, National Prosecution Standards (3<sup>rd</sup> Ed.), p. 33; (emphasis added). See <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

limits.

To explain his omission, the prosecutor informed the trial court that he did not talk to his witnesses about the pretrial ruling on the excluded evidence because those witnesses, including Chief Irvin, were in the court for the hearing on the 404(b) motion and heard the court's ruling. [CD; 08/09/11; 01:20:35-48.] This hardly seems an adequate prophylactic measure in view of the prosecution's acknowledged pretrial strategy to question these witnesses about the "trafficking cases involving Mr. Grider in Russell County."

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Kentucky Rule of Professional Conduct 3.8, Commentary (1); SCR 3.130.

Under these circumstances, the prosecutor's failure to warn his witnesses to comply with the pretrial ruling and not refer to the "other trafficking cases involving Mr. Grider in Russell County" undoubtedly increased significantly the risk that this inadmissible evidence would be erroneously placed before the jury.

**Chief Irvin Was Aware of the Pretrial Ruling That Barred Any Reference to Other Alleged Drug Transactions in Russell County.** The prosecutor at trial conceded on the record that Chief Irvin had been present in the courtroom during the hearing on the defense motion in limine and heard the judge's ruling. The prosecutor believed that Chief Irvin was well aware that no mention was to be made of evidence pertaining to the pending charges in Russell County. [CD; 08/09/11; 01:20:35-48.] Additionally, the video recording of the hearing on the 404(b) motion shows Joe Michael Irvin, Chief of the Russell Springs

Police Department, in the courtroom audience, directly behind the prosecution's table, observing the arguments of counsel and the trial judge's rulings. [CD; 08/08/11; 10:30:38-10:37:56.]

This pretrial ruling was made on the first day of trial, Monday, August 8, 2011. Chief Irvin testified in the middle of the next day, Tuesday, August 9, 2011. [CD; 08/09/11; 01:05:13.] The pretrial ruling should have been fresh in Chief Irvin's memory when he testified. This was not a situation where the pretrial ruling had been made weeks or months in advance of the witness's testimony. Under these circumstances, Chief Irvin should have been especially attuned to avoiding any reference to other drug transactions in Russell County involving Mr. Grider.

It is difficult to believe that an experienced law enforcement agent, such as Chief Irvin, would have forgotten this judicial limitation on the contents of his testimony.

**Chief Irvin's Reference to the Inadmissible Evidence Was Intentional and Calculated to Bolster the Prosecution's Case.** Chief Irvin was aware that the prosecutor's efforts to introduce evidence of Mr. Grider's alleged drug trafficking in Russell County had been thwarted by the judge's ruling immediately before the trial that evidence of that nature would be inadmissible in this trial. [CD; 08/08/11; 10:35:15-36:36.] Chief Irvin knew that the prosecutor believed evidence of Mr. Grider's drug trafficking in Russell County would be beneficial to the Commonwealth's case being tried in Adair Circuit Court. Most likely, in his witness preparation with the prosecutor that occurred before the trial began, Chief Irvin had expected to be able to testify about Mr. Grider's other trafficking cases in Russell County as the prosecutor had desired. Additionally, Chief Irvin had heard the prosecutor, in response

to the defense's motion in limine, argued for the admissibility of those Russell County drug transactions in the trial of the single Adair County charge.

All of these circumstances lend credence to the conclusion that Chief Irvin intentionally informed the jury of "the other trafficking cases involving Mr. Grider in Russell County," even though aware that the judge had ruled that information inadmissible.

**The Jury's Sentencing Recommendation is an Indicator of the Ineffectiveness of the Admonition.** The jury's decision to recommend a sentence of nine years on a Class C felony, one year less than the maximum sentence, for a first offender who received neither money nor other benefits from the charged transaction can best be explained by the jury's belief that Mr. Grider was involved in other cases of drug trafficking in Russell County. No prior convictions were presented to the jury during the sentencing phase hearing nor was any other type of aggravating information. [CD; 08/11/11; 04:27:43-50.] Under these circumstances, the jury's decision to recommend a nine-year sentence for a 72-year-old man with no prior convictions is a strong indicator that the admonition was ineffective in purging Chief Irvin's inflammatory reference to "the other trafficking cases involving Mr. Grider in Russell County."

**An Admonition is Insufficient as a Matter of Policy When an Experienced Police Officer Violates a Pretrial Order Banning the Admission of Uncharged Misconduct.** An experienced law enforcement officer, such as Chief Irvin, would have testified numerous times in criminal cases as a prosecution witness. If a police officer knows that his or her violation of a pretrial order excluding evidence of uncharged criminal offenses will most likely be addressed and supposedly remedied by the trial judge telling the jury to disregard

the inadmissible evidence, there is an incentive for the experienced police witness to violate the order, contaminate the jury with inadmissible evidence and increase the chances of the defendant being convicted. This strategy is particularly attractive when the experienced police witness believes that the judge's admonition will not purge from the minds of the jurors, whether one juror or all, the knowledge that Mr. Grider has "other trafficking cases" in Russell County.

Experienced police officers know it is difficult to "unring the bell." *Sandez v. United States*, 239 F. 2d 239, 248 (9<sup>th</sup> Cir. 1956). As courts have recognized, "[i]t is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." *Dunn v. United States*, 307 F. 2d 883, 886 (5<sup>th</sup> Cir. 1962). This common knowledge encourages experienced police witnesses to roll the dice and violate the court's exclusion order, when they are confident that the judge will respond to their introduction of excluded evidence with an admonition, not a mistrial.

"Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state." *Wright v. State*, 325 P.2d 1089, 1093 (Okl. Cr. 1958). Having been warned by the trial court that such evidence is inadmissible, the violation of that pretrial order by an experienced police officer should generate, as a matter of policy, the granting of a mistrial. An order without an effective sanction encourages its violation.

**Deficiencies in the Prosecution's Case.** The prejudice from Chief Irvin's testimony

is apparent when the following factors are examined: (1) the only witness to identify Mr. Grider as the man involved in the alleged methadone trafficking incident was the confidential informant, Leah Wilson, who admitted to being a drug user and drug seller during the time she was a paid informant in this case; (2) in the video recording of the transaction in question the face of the perpetrator cannot be seen; (3) none of the law enforcement officers in and around Leah Wilson's residence where the trafficking transaction occurred could identify either Leon Grider or his vehicle as being the person or vehicle that came there for the trafficking transaction; (4) the description in the police report of Leon Grider's attire on the day of the trafficking transaction was different from the clothing the man in the video was wearing; and (5) the audio recordings of the phone conversations between the confidential informant and allegedly Mr. Grider were virtually inaudible as the jurors acknowledged.

**The Confidential Informant's Credibility Was in Doubt.** The only witness to identify Mr. Grider as the man involved in the alleged methadone trafficking incident at the mobile home was the paid confidential informant, Leah Wilson, who admitted to being a drug user and drug seller during the time she was an informant in this case. [CD; 08/10/11; 09:36:58-10:38:40.] Her credibility, specifically her character for untruthfulness, was seriously impugned on cross-examination. KRE 608(b)(1), *Evidence of character and conduct of witness*.<sup>12</sup>

“As the [United States] Supreme Court has noted, ‘the exposure of a witness’

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“Specific instances of the conduct of a witness .... may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness ... concerning the witness' character for truthfulness or untruthfulness.” KRE 608(b)(1), *Evidence of character and conduct of witness*.

motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Bratcher v. Commonwealth*, 151 SW 3d 332, 343 (Ky. 2004), quoting *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). As a paid confidential informant, Leah Wilson had a motive to testify falsely to provide the police officers for whom she worked with the testimony that they wanted to prove their case and to continue to earn money as a police informant.

The Commonwealth in the appellate court below *conceded* that trial defense counsel “successfully impeached” the confidential informant “through the cross-examination of other witnesses.” [Commonwealth’s Brief for the Appellee, Court of Appeals, 3.] In that same brief the Commonwealth also acknowledged that defense counsel did “revisit that working relationship [between the confidential informant and the officers] to show how unreliable the confidential informant was.” [*Id.*, 2.] In the appellate court below the Commonwealth conceded that the case had “only one main witness who was the recipient of the controlled substance,” the admittedly unreliable confidential informant. [*Id.*, 4.]

As the Court of Appeals observed, “[w]hile working as a CI in this case, Wilson was addicted to drugs, was a paid informant, and continued to sell illegally controlled substances.” *Grider v. Commonwealth*, *supra*, No. 2011-CA-002003-MR, M/S Op., p. 2; App., 2.

The confidential informant’s credibility and reliability as a witness were seriously undermined in this trial.

**The Face of the Perpetrator is Not Visible in the Video Recording of the Transaction.** In the video recording of the transaction in question, the face of the perpetrator

cannot be seen due to the angle of the video camera and its placement.

The recording does contain audio and video of an unidentifiable person handing Leah Wilson what appears to be a distributor's bottle of 100 methadone pills and a taped up strip of paper containing sixty (60) Xanax. [CD; 08/09/11; 10:51:15-10:52:10.] The person in the video recording with Leah Wilson cannot be identified because the video footage never shows the face of that person, always ending at the neck of that person. As a result, only Leah Wilson, the paid confidential informant, testified that the person in the recording at her mobile home was Leon Grider, as no other witnesses were present during the transaction.

The Court of Appeals emphasized that “[t]he other person in the video [the perpetrator] is viewed only from the neck down based on the angle of the camera.” *Grider v. Commonwealth, supra*, No. 2011-CA-002003-MR, M/S Op., p. 3; App., 3.

This was yet another weakness in the prosecution's case.

**The Law Enforcement Officers in the Area When the Transaction Occurred Did Not See Either the Perpetrator or the Perpetrator's Vehicle.** None of the law enforcement officers in and around Leah Wilson's residence where the trafficking transaction occurred could identify either Leon Grider or his vehicle as being the person or vehicle that came there for the trafficking transaction. The three law enforcement officers, who were all at Leah Wilson's mobile home in anticipation of Mr. Grider's expected arrival, went down the road from the mobile home and hid in a secluded, wooded area. [CD; 08/09/11; 10:25:45-10:26:10; 10:32:12.] Consequently, none of those officers were in a position to identify either the vehicle that drove up to the mobile home or the person who exited the vehicle and entered the mobile home. No photos of the vehicle or its driver were taken outside the

mobile home. None of the officers could testify as to the make, model and year of the vehicle or even give the license plate number on the vehicle because none of the officers viewed the driver as he left the mobile home, entered the vehicle and drove away.

The Court of Appeals in the opinion below noted that “none of the officers were present at Wilson’s mobile home nor were in position to identify either the vehicle that drove up to the mobile home or the person who exited the vehicle and entered the mobile home.” *Grider v. Commonwealth, supra*, No. 2011-CA-002003-MR, M/S Op., p. 3; App., 3.

This was another defect in the Commonwealth’s case.

**Officer Rogers’ Testimony that Mr. Grider’s Attire on the Day in Question was the Same as the Perpetrator’s Attire in the Video of the Transaction Was Inconsistent With His Statements as Recorded in the Uniform Offense Report.** Jamie Rogers, a member of the Russell Springs Police Department, was assigned to conduct surveillance on Leon Grider during the day and evening of June 4, 2004, the day of the alleged transaction. [CD; 08/09/11; 10:31:27-43.] Mr. Rogers testified at trial that on June 4, 2004 Leon Grider was wearing a “light shirt” and “dark pants,” just like the person in the video recording at Leah Wilson’s mobile home that evening. [CD; 08/09/11; 01:56:45-50; 02:15:36; 08/11/11; 01:15:33-17-56.] However, the Uniform Police report that Detective Hammond prepared in June 2004 noted that Officer Rogers had described Leon Grider, while in Russell County on the day in question, as wearing “tan/khaki pants and a yellow shirt,”<sup>13</sup> pants different from both the “dark pants” described in Rogers’ trial testimony and the dark pants worn by the person in the video recording. [CD; 08/11/11; 10:05:26-18:39.]

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<sup>13</sup> Uniform Police Report, page 4.

Detective Hammond in that same Uniform Police Report in describing the clothing worn by the perpetrator at Leah Wilson's mobile home, as captured on the video, as being "khaki pants and a yellow shirt," just as Officer Rogers had described the clothing Mr. Grider had worn in Russell County earlier that day.<sup>14</sup> [CD; 10:09:27.] But, in actuality, the perpetrator in the recording was wearing "dark pants."

As demonstrated on cross-examination of Officer Rogers and the direct examination of Detective Hammond on recall, Officer Rogers' 2011 trial testimony was substantially different from his 2004 statements to Detective Hammond concerning the color of the pants he saw Mr. Grider wearing in Russell County. Officer Rogers' trial testimony concerning the color of Mr. Grider's pants was calculated to conform that description of Mr. Grider's pants to the color of the pants worn by the perpetrator in the video of the transaction, despite Rogers' June 4, 2004 statement to the contrary.

Additionally, Detective Hammond, without reviewing the video in question, entered in his official report that the perpetrator in the video was wearing "khaki pants and a yellow shirt" so that the clothing the person in the video was wearing would match Officer Rogers' description of Leon Grider's clothing earlier that day, even though the video actually showed otherwise. Detective Hammond admitted that he had not watched the video and had not talked to Leah Wilson, the other person present during the videoed transaction. Instead, Detective Hammond had just used Officer Rogers' description of Mr. Grider's shirt and pants worn in Russell County earlier in the day of the transaction to describe the clothing worn by the person in the video. This was an apparent attempt to ensure that Leon Grider

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<sup>14</sup> Uniform Police Report, page 6.

and the perpetrator were similarly dressed on the day of the drug transaction. [CD; 08/09/11; 02:13:58-16:16.]

Officer Rogers' use of the word "khaki" in his description of the pants Mr. Grider was wearing could not have been to describe a type of pants as opposed to a color. When asked on cross-examination "were these [pants] like cotton wash pants," Officer Rogers answered, "I don't know that." [CD; 08/09/11; 2:15:58-16:02.] "Khaki" can refer to a "khaki fabric of twilled cotton or wool." *Oxford Pocket Dictionary and Thesaurus, American Edition*, Oxford University Press, 1997, p. 435. However, Officer Rogers had no idea as to the type of pants Mr. Grider was wearing, but only the color of the pants. "Khaki" as a color is a "dull yellowish brown," not to be mistaken for a "dark" hue. *Id.*

Officer Rogers claimed on the witness stand that Mr. Grider's pants during Rogers' surveillance of him in Russell County on the day in question were "dark pants," even though his description in the police report contained no words indicating the pants were dark.

Additionally, Officer Rogers had immediately after the June 4, 2004 transaction had described Mr. Grider's pants as "tan/khaki pants." "Tan," as a hue, is "yellowish brown." *Oxford Pocket Dictionary and Thesaurus, American Edition, supra*, p. 818.

The Court of Appeals acknowledged this discrepancy in the Commonwealth's evidence:

Officer Rogers testified that Grider was wearing the same color pants and shirt as the person in the video recording at Wilson's home. However, the police report that Officer Rogers filed in 2004 described Grider as wearing a shirt and pants different from both his trial testimony and the person in the video recording.

*Grider v. Commonwealth, supra*, No. 2011-CA-002003-MR, M/S Op., p. 3; App., p.3.

This conduct by both Officer Rogers and Detective Hammond should have raised in the jurors' minds considerable doubt about the credibility of these two law enforcement agents as well as the integrity of the investigation of this case. This was yet another major defect in the prosecution's case against Mr. Grider.

**The Police's Audio Recordings of the Confidential Informant's Phone Call Allegedly Made to Mr. Grider Requesting Delivery of the Controlled Substance Were Virtually Inaudible.** As the prosecutor stated in his guilt phase closing argument, "They [the law enforcement officers] attempted to record conversations and, yes, I agree that those recorders of the telephone did not rate as well as I am sure they [the police] would have hoped to." [CD; 08/11/11; 01:50:38-44.] The prosecutor added, "You could hear Leah Wilson, you know the type of conversations she was having." [*Id.*, 1:50:45-48.]

When the police had Leah Wilson telephone Leon Grider, they attempted to record that phone conversation. There were two calls made by Leah Wilson that the police recorded and one call allegedly from Mr. Grider to Leah Wilson that was not recorded. [CD; 08/09/11; 10:34:14-31:15.] When the recordings of the phone calls were played in open court, they were virtually inaudible. [CD; 08/09/11; 03:17:48-26:54; 03:32:16-36:34.] At the conclusion of the playing of the first tape, one juror complained that it was hard to follow the conversation on the tape. [CD: 08/09/11; 03:28:21-46.] At the defense request, the jurors were questioned as to whether they could hear the tape and all responded negatively. [03:29:36.] The second recording was similarly difficult to hear. At the conclusion of the second tape, the defense objected to the admission of the tapes as they were unintelligible,

but the objection was overruled.<sup>15</sup> [03:37:45-54.]

The recordings picked up Leah Wilson's portion of the conversation better than the person on the other end of the call, but both tapes were extremely difficult to hear.

Additionally, the prosecution did not introduce into evidence phone records from either the phone Leah Wilson used or from Mr. Grider's phone to verify that Mr. Grider was actually a party to the phone calls in question. [CD; 08/11/11; 01:24:47-25:15.]

As a result, the only evidence of Mr. Grider participating in these phone calls was the testimony of the paid confidential informant, who was admittedly a drug addict who sold controlled substances illegally while working for law enforcement.

**The Jury Was Reminded of These Factors.** Not only were the above deficiencies in the prosecution's case revealed to the jury through the defense examination of witnesses, but defense counsel reminded the jury of each of these factors during his guilt phase closing argument. [CD; 08/11/11; 01:09:56-48:13.]

Under these circumstances, "there is a strong likelihood that the effect of the inadmissible evidence would be devastating to" Mr. Grider. *Johnson v. Commonwealth*, *supra*, 441.

**The Evidentiary Harpoon.** This problem of law enforcement officers injecting inadmissible evidence into a criminal trial is well recognized across the country. "The volunteering by police officers of inadmissible testimony prejudicial to the defendant has

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"It is within the discretion of a trial judge to decide whether because portions of a tape are inaudible or indistinct, the entire tape must be excluded." *Sanborn v. Commonwealth*, 754 SW 2d 534, 540 (Ky. 1988), citing *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir.1983).

been condemned time and again by both state and federal courts.” *Gregory v. United States*, 369 F.2d 185, 189-90 (D.C. Cir. 1966). In other jurisdictions some courts have acknowledged the “evidentiary harpoon,” which is the effort by a law enforcement officer to place clearly inadmissible information before the jury in an attempt to sabotage the defense case and buttress the prosecution’s case. “An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant.” *Kirby v. State*, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002); *Wright v. State, supra*, 1093. Regardless of the terminology, there is a danger that experienced law enforcement officers when testifying will intentionally or negligently blurt out inadmissible evidence of uncharged misconduct, despite being warned that such evidence is off limits, prejudicing the jury.

Importantly, a claim of error premised on an alleged evidentiary harpoon does not require a claim of intentional misconduct on the part of the prosecutor. For example, the Indiana courts “do not place distinguishing significance upon the fact that the deliberate act was that of the police officer witness rather than that of the prosecution itself.” *Perez v. State*, 728 N.E.2d 234, 237 (Ind. Ct. App. 2000). Witness statements that are not responsive to posed questions can amount to evidentiary harpoons. Certainly inadmissible evidence volunteered by an experienced law enforcement officer, in violation of the court’s pretrial order, can be an evidentiary harpoon.

The Oklahoma courts have “set out the elements necessary to classify an officer’s statement as an evidentiary harpoon: ‘(1) they are generally made by experienced police officers; (2) they are voluntary statements; (3) they are willfully jabbed rather than

inadvertent; (4) they inject information indicating other crimes; (5) they are calculated to prejudice the defendant; and (6) they are prejudicial to the rights of the defendant on trial.” *Anderson v. State*, 704 P. 2d 499, 501 (Okl. Cr. 1985), quoting *Bruner v. State*, 612 P.2d 1375 (Okl. Cr. 1980). Under Oklahoma’s criteria, Chief Irvin’s reference to “the other trafficking cases involving Mr. Grider in Russell County” was an “evidentiary harpoon.”

Contrary to the trial judge’s opinion, Chief Irvin’s injection of the judicially barred information into the jury trial did cross “the edge of dirty pool,” particularly when Chief Irvin’s knowledge of the pretrial order banning that information is factored into the equation. [CD; 08/09/11; 01:22:40-55.]

**Psychological Theory and Admonitions.** The three major psychological theories that explain why jurors fail to ignore inadmissible information are: (1) motivation-based theory (reactance theory); (2) ironic mental processes; and (3) mental contamination. Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 Rev. Litig. 117, 122-125 (Winter 2013).<sup>16</sup>

*Motivation-Based/Reactance Theory.* “Reactance theory says that when a juror hears an admonition or limiting instruction, he views it as an attempt to restrict his freedom.” *Id.*, 122-123. “According to reactance theory, when individuals perceive that their ability to

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This Court has recently considered psychological studies and behavioral theory in its analysis of conflicts of interests for lawyers. *U.S. v. Kentucky Bar Ass’n*, 439 SW 3d 136, 154-155 (Ky. 2014). See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavior Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1478 (1998) (“The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior....”)

perform behaviors is threatened they will become psychologically aroused, which is known as reactance.” Joel D. Lieberman and Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 Psych. Pub. Pol. and L. 589, 607 (December, 1997).

“As a result of this constraint, the juror is motivated to reassert his freedom and will consider the evidence specifically because the judge has told him to disregard it.” Chortek, 123. “Consequently, the jurors may not only fail to ignore the evidence but instead focus additional attention on it.” Lieberman & Sales, 607. The underlying concept of this theory is that jurors are unwilling, rather than unable, to disregard information they have been told to ignore. Chortek, 123.

*Ironic Mental Processes Theory.*<sup>17</sup> The theory of ironic mental processes explains that “individuals who attempt to suppress specific thoughts may fail precisely because of the effort they engage in to suppress those thoughts.” *Id.* According to this theory, when a juror attempts to ignore or suppress information, he or she must monitor his or her thoughts to ensure he succeeds in disregarding the inadmissible information. But, a juror’s mental monitoring efforts to not consider the information will keep that information available. “Unlike the motivation-based theory, the premise of this theory is that jurors are unable to disregard the information rather than simply unwilling to disregard it.” Chortek, 123. See Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 Ann. Rev. Psychol. 59, 60-64 n. 15 (2000) (reviewing studies in which participants were instructed to avoid thoughts

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Daniel M. Wegner, *Ironic Processes of Mental Control*, Psychological Review, Vol. 101, No. 1, 34-52 (1994). <http://www.tamu.edu/faculty/stevesmith/689/Suppression/Wegner%201994.pdf>.

of particular items – such as a white bear – and finding that attempts to suppress thoughts of the items were unsuccessful and often counterproductive.)

*Mental Contamination Theory.* According to the mental contamination theory, “when jurors hear a piece of information, such information ‘contaminates’ their thoughts in a way that persists even after they become aware that the information may be problematic.” Chortek, 123-124. A juror may not even be aware that his or her judgment has been affected by the information in question, making it extremely difficult for the juror to restrict or eliminate the influence of the inadmissible evidence. In such a situation, a juror may actively attempt to disregard the inadmissible information, yet the information will nevertheless influence the juror’s judgment. *Id.*, 124.

These three psychological theories provide behavioral support for the principle that “the presumptive efficacy of an admonition falters ... when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant.” *Johnson v. Commonwealth, supra*, 441.

**Mr. Grider Was Denied His Constitutional Right to Due Process of Law.** Chief Irvin’s injection into the trial of “the other trafficking cases involving Mr. Grider in Russell County” was “of such character and magnitude” that Mr. Grider was “*denied a fair and impartial trial* and the prejudicial effect” could “be removed in no other way” than by declaring a mistrial. *Woodard, supra* at 68; (emphasis added). By refusing to grant Mr. Grider a mistrial, the trial court denied Mr. Grider due process of law. Amendment XIV, U.S. Const.; § 2, Ky. Const.

“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” *Estelle v. Williams*, 425 US 501, 503 (1976). “To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process,” such as the injection of inadmissible, inflammatory and prejudicial information. *Id.* “In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt,” as opposed to a conviction tainted by inadmissible uncharged misconduct. An admonition could not cure the introduction of this inadmissible evidence. Only a mistrial could have restored Mr. Grider’s right to a fair trial. Mr. Grider was denied his federal and state constitutional right to due process of law.

**A Mistrial Was Mandated.** For all of the reasons delineated above, “there is an overwhelming probability that the jury” was “unable to follow the court’s admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to” Leon Grider. *Johnson, supra*, 441. Additionally, there is a strong “indication” that Chief Irvin “deliberately” injected this inadmissible evidence into the trial, since Irvin was concededly aware of the pretrial ruling and the prosecutor’s desire to make the “other trafficking cases involving Mr. Grider in Russell County” a key ingredient of his case. See *Phillips v. Commonwealth, supra*, 237.

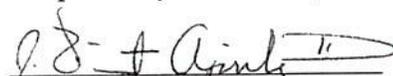
As explained above, the injection of information that there were “other trafficking cases involving Mr. Grider in Russell County,” in violation of the trial court’s pretrial ruling, created “a fundamental defect” in Mr. Grider’s jury trial of a single trafficking charge, generating a “manifest necessity” for a mistrial. *Woodard, supra* at 68. The introduction of

this inadmissible evidence, under the facts and circumstances of this case, was “of such character and magnitude” that Mr. Grider would have been “denied a fair and impartial trial” unless a mistrial was granted, because “the prejudicial effect” of the inadmissible evidence” could “be removed in no other way.” *Id.* Because the defense request for a mistrial was denied and only an admonition was given, Leon Grider was denied a fair trial and impartial trial. Reversal is required.

### CONCLUSION

Accordingly, for the reasons delineated above, this Court must reverse the opinion of the Court of Appeals, reverse the judgment and sentence of the Adair Circuit Court and remand this case to the Adair Circuit Court for a new trial and/or any other relief this Court finds appropriate.

Respectfully submitted,



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Appellant