Supreme Court of Kentucky
File No. 2012-SC-130-MR

Michael St. Clair — Appellant

v.

Appeal from Hardin Circuit Court
Hon. Thomas O. Castlen, Judge
Nos. 1991-CR-207-2 and 1992-CR-2-2

Commonwealth of Kentucky — Appellee

Brief for Appellant St. Clair

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Certificate of Service:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed postage prepaid to Hon. Thomas O. Castlen, Senior Judge, P. O. Box 215, Owensboro, KY 42302; the Hon. Dana M. Todd, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; the Hon. Scott Drabenstadt, Kamenish Law Office, 239 S 5th Street # 1916, Louisville, KY40202-3209; the Hon. Justin Brown, 436 South 7th Street, Suite 100, Louisville, KY 40203; and the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601, on June 3, 2013. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

Susan J. Balliet

Introduction

In Hardin County in 2001 the appellant Michael St. Clair was tried, convicted, and sentenced to death for the kidnap/murder of Frank Brady. Due to spousal privilege violations this court vacated appellant's conviction and sentence in *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005) (*Hardin I*). A second trial ended quickly in mistrial when the prosecutor informed the jury in opening statement that in addition to the kidnap/murder of Brady they would hear appellant cold-bloodedly murdered a man in New Mexico. Appellant's third Hardin County trial –which featured and amplified the same evidence-- resulted in a new death sentence for capital kidnap; appellant appeals as a matter of right.

Statement Concerning Oral Argument

Mr. St. Clair requests oral argument because the death penalty has been imposed; the record and issues are complex, and KRS 532.075(4) mandates oral argument.

Preface

Appellate review of a case involving the death penalty requires great caution. Under KRS 532.075(2), this court reviews unpreserved errors as well as preserved errors when the death penalty has been imposed because "[d]eath is unlike all other sanctions...." *Beck v. Alabama*, 447 U.S. 625 (1980); *Rogers v.*

Commonwealth, 992 S.W. 2d 183, 187 (Ky. 1999); *Perdue v. Commonwealth*, 916 S.W. 2d 148, 153-154 (Ky. 1995) *Cosby v. Commonwealth*, 776 S.W. 2d 367 (Ky. 1989); *Campbell v. Commonwealth*, 564 S.W.2d 258, 531 (Ky. 1979). In a death case there is no reasonable justification for trial counsel's failure to object to any substantial error, and such failures cannot be considered a legitimate trial tactic. Without the unpreserved errors as well as the preserved errors raised here, the jury might not have sentenced Michael St. Clair to death. *Perdue.* In accordance with CR 76.12(4)(c)(iv), counsel have noted at the beginning of each issue whether it is preserved. Where the issue is unpreserved counsel will not repeat reference to KRS 532.075(2) or the other authorities cited in this paragraph.

Record Citations

The following abbreviations are used in referring to the appellate record:

TR I – XXXIX, pages	Transcript of record
VHR 1-51	Pre-trial and trial proceedings 2001 - 2012
Ex.	Exhibit
A.	Appendix

Citation to prior St. Clair opinions

Bullitt I	*St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004)
Hardin I	*St. Clair v. Commonwealth*, 174 S.W.3d 474, 477 (Ky. 2005)
Bullitt II	*St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010)

Statement of Points and Authorities

Statement of the Case

For over 20 years at inconceivable expense two Kentucky counties have taken turns trying, convicting, and repeatedly sentencing appellant Michael St. Clair to double death sentences for the kidnap and murder of Frank Brady. For murdering Brady, after one trial and two re-sentencing trials, Bullitt County has imposed death on appellant three times.[1] For capital kidnap, after three trials including a mistrial, Hardin County has sentenced him to death twice. This appeal from appellant's second death sentence in Hardin County demonstrates that the double-prosecution double-death approach has produced nothing but a big, expensive mess.

Indictment, first trial, first appeal, and second pre-trial: In December 1991 Hardin County indicted appellant on two counts of receiving stolen property, criminal attempt to commit murder, and second-degree arson; a second indictment in January 1992 charged him with capital kidnapping. In 2010 the court ordered that the two indictments were in fact joined.[2] Hardin County first convicted appellant of capital kidnap and sentenced him to death in 2001. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 477 (Ky. 2005) (*Hardin I*). *Hardin I* overturned appellant's 2001 convictions and sentences and remanded

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[1] Appellant's latest Bullitt County death sentence is pending in this court in No. 2011-SC-774-MR (*Bullitt III*).

[2] Order re: Joinder or Severance, May 26, 2010, TR XXXII, 4726.

for further proceedings. Repeated judicial reassignment,[3] repeated changes in the defense and prosecution teams,[4] and an interlocutory writ[5] delayed the ever-increasingly massive case until the second trial finally began in 2009.

Second trial ended in mistrial when prosecutor violated 404(b) orders.

The second trial ended when the prosecutor informed the jury --by broadly implying forbidden "uncharged crimes" evidence in opening statement-- that on his way to Kentucky appellant committed an uncharged murder in New Mexico. Judge Stephen Ryan immediately stopped the trial, prompted the defense to request a mistrial, and granted it.[6] Shortly after that the case was reassigned to Judge Thomas O. Castlen.[7]

Third trial.

The statement of facts in *Hardin I* primarily describes the prosecution's evidence, most of which was re-introduced at the third trial:

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[3] Since the 2005 remand in *Hardin I* five judges have presided over the case including Judges Thomas Waller, Janet Coleman, Ann O'Malley Shake, Stephen Ryan (who presided over the 2009 mistrial) and Thomas O. Castlen (who presided over the third trial).

[4] Defense trial counsel after remand, in order: Ted Shouse and Jim Gibson, Vince Yustas and John Heineman, Yustas and Chris McCrary, Yustas solo four months, Scott Drabenstadt solo one year, and finally Drabenstadt and Justin Brown. Prosecution teams in order: Dana Todd and David Smith, then Todd, Tom Van De Rostyne, and Todd Lewis, and finally Todd and Lewis.

[5] *St. Clair v. Coleman*, 2008 WL 2484715, (Ky. June 19, 2008) (*Coleman*) (Unreported) Copy attached at Tab 16.

[6] VHR 37, 6/08/09, 10:21:40 – 11:03:07.

[7] Ten months later, the Bullitt case was remanded a second time. *St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010) (*Bullitt II*).While rehearing was pending in *Bullitt II*, defense co-counsel Chris McCrary left DPA and joined the Hardin County Attorney's office.

> According to the evidence, Appellant escaped from Oklahoma authorities in September of 1991 while awaiting final sentencing for two Oklahoma murder convictions. St. Clair and Dennis Gene Reese stole a pickup truck from a jail employee and fled from the jail in Durant, Oklahoma. The pickup truck eventually ran out of gas and Reese and St. Clair stole another pickup truck, a handgun, and some ammunition from the home of Vernon Stephens and headed for the suburbs of Dallas, Texas. St. Clair's wife at the time, Bylynn St. Clair[4] ("Bylynn"), met with her husband and Reese in Texas, and provided them with money, clothing, and other items. Reese was arrested several months later in Las Vegas, Nevada, and confessed to his involvement in the Kentucky events detailed below.
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> According to Reese, after escaping from jail in Oklahoma, he and St. Clair traveled to Colorado where they kidnapped Timothy Keeling and stole Keeling's pickup truck. Keeling was later murdered in New Mexico. St. Clair and Reese proceeded to drive Keeling's truck to New Orleans, Louisiana, then through Arkansas and Tennessee before arriving at a rest stop in southern Hardin County, Kentucky. While in Hardin County, they decided to steal Frank Brady's late model pickup truck. They kidnapped Brady and drove him from Hardin County to Bullitt County where St. Clair shot and killed Brady. St. Clair and Reese then returned to Hardin County and set fire to Keeling's truck.
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> Witnesses to the arson gave the Kentucky State Police a description of the Brady truck seen near the location where Keeling's truck was on fire. Based on that description, Trooper Herbert Bennett stopped Reese and St. Clair while they were still driving Brady's truck through Hardin County. St. Clair fired two shots at Trooper Bennett, one of which penetrated the radiator of the police cruiser. A high-speed chase followed, but Reese and St. Clair escaped when Bennett's cruiser became disabled.

Hardin I, 174 S.W.3d at 477.

The above describes basically Dennis Reese's testimony against appellant. This appeal presents the defense case as well and compares it with Reese's version of events.

In this third Hardin County trial, St. Clair's only hope of avoiding a death penalty was to convince the jury –based on a comparison of the two men's histories --their "m.o.'s"--that it was in fact more likely his co-defendant Reese, and not he, who kidnapped and murdered Brady.[8] The record reveals Reese as the more capable of the two men and a more likely leader. In the end, after the two men split up in Kentucky, Reese traveled, hid in the open, found a social security card, got himself a fake ID, registered to vote, qualified for food stamps, and made money by preying on others.[9] By contrast, appellant hitched a ride straight home from Kentucky to Oklahoma, hid in barns and depended on friends and family to shield and feed him, like a child.[10] Appellant said the escape from jail was initially Reese's idea.[11] He said Reese was talking about killing the Stevens, but appellant talked him out of it.[12] They split up in Denton, Texas, soon after their escape. Reese went to Colorado and New Mexico alone; Reese kidnapped and killed Keeling alone.[13] A week later, Reese returned to the motel in Texas where he'd left appellant. Reese was driving a white pickup, which he said he'd stolen.[14] The two then drove to Louisiana.[15]

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[8] Defense opening, VHR 42, 1/10/12, 4:44:00 – 4:48:03.
[9] VHR 43, 1/11/12, 1:37:42, 1:48:12.
[10] VHR 48, 1/18/12, 10:01:31 – 10:12:19.
[11] VHR 48, 1/18/12, 9:00:53.
[12] VHR 48, 1/18/12, 9:09:32 et seq.
[13] VHR 48, 1/18/12, 1:53:49 et seq.
[14] VHR 47, 1/18/12, 9:50:38 and 11:03:32; VHR 48, 1/18/12, 1:55:50 – 1:57:45.
[15] VHR 43, 1/11/12, 1:08:17.

From there they drove north through Arkansas, Tennessee, and into Kentucky.[16] In Kentucky, they drove up and down I-65 between Louisville and the area north of Elizabethtown.[17]

Appellant admitted coming to Kentucky. But he has staunchly denied kidnapping or killing Brady. Appellant wanted to lie low, not draw attention; it was Reese who wanted to hunt at truck stops and rest stops for victims to rob.[18] According to appellant, Brady voluntarily let Reese in the passenger side of his truck, and the two drove off alone.[19] According to appellant, it was Reese who killed Brady for his red pickup truck. When Reese returned, he told appellant to follow him in Keeling's truck. It was Reese who set the truck on fire. Appellant considered that was "dumb," because it drew unwanted attention.[20]

After evading capture in Kentucky, appellant hitched a ride home to Oklahoma where he hid in barns, in a church, in the woods, and finally walked to his brother Hansel's house on December 19, 1991, where he was promptly arrested.[21] A month later Reese was captured in Las Vegas while negotiating his

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[16] VHR 43, 1/11/12, 1:01:14, 1:07:00 et seq., and 1:10:00.
[17] VHR 43, 1:11:19, 1:13:23 and 1:18:24.
[18] VHR 48, 1/18/12, 1:58:37 -1:59:39.
[19] VHR 48, 1/18/12, 2:03:39 – 2:05:06.
[20] VHR 48, 1/18/12, 2:07:37 – 2:08:31; The jury apparently believed appellant regarding Keeling's truck, as illustrated by the fact they convicted him of mere facilitation to second-degree arson. TR XXXIX, 5711-5717, at Tab 1.
[21] VHR 47, 1/18/12, 10:11:20 – 10:13:18.

surrender.[22] Within a year Reese had settled the Kathy Burns murder charge and all his other Oklahoma charges for LWOP plus 160 years. For his crimes in Kentucky he pled to LWOP25, the maximum sentence at the time short of the death penalty. Reese admitted no one could corroborate his story that appellant went with him to Colorado. No one could produce bus tickets, phone records, or motel records to corroborate appellant's presence in Colorado or New Mexico.[23] No one could corroborate Reese's story from the moment Brady appeared at the rest stop until he died.[24]

As illustrated by the issues below, the defense's m.o.-comparison theory was frustrated by court rulings that allowed the prosecution to bolster Reese's credibility and denied defense evidence that would have revealed how closely Reese's m.o. matched the kidnap/murder of Brady. As in the 2001 trial, appellant's third jury found all three aggravating circumstances beyond a reasonable doubt: 1) the kidnapping victim was not released alive; 2) the defendant had a prior record of conviction for capital murder (William Harry Kelsey, Jr. and Ronnie St. Clair); and 3) the kidnap was committed during a robbery.[25] For the crime of kidnap/victim-not-released-alive the jury was given

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[22] VHR 43, 1/11/12, 1:48:44.
[23] VHR 43, 1/11/12, 2:36:10 – 2:38:49.
[24] VHR 43, 1/11/12, 2:39:17 – 2:41:08.
[25] Jury Instructions and Verdict Forms, TR XXXVIII, 5591-5623, at Tab 2.

options including 20-50 years or life, LWOP25, or death.[26] Appellant was convicted of two counts of receiving stolen property (five years recommended on each count), one count of attempted murder of a sheriff's deputy (20 years), and one count of criminal facilitation to second-degree arson (five years). The jury found him guilty of capital kidnap under KRS 509.040 and recommended death.[27] The jury's recommended sentences were imposed on February 1, 2012.[28] Appellant challenges the 2012 convictions and sentences as a matter of right.

Argument

1. Retrying appellant after the 2009 mistrial violated his right to be free of double jeopardy; the Commonwealth intentionally invited a mistrial.

Preservation. This issue is preserved by repeated defense motions to dismiss due to prosecutorial misconduct in causing a mistrial and Judge Ryan's order finding mistrial was a manifest necessity.[29] The second Hardin County jury was

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[26] St. Clair refused instruction on LWOP. TR XVII, 2367; TR XVIII, 2532; TR XXIV 3511; TR XXVI, 3799.

[27] TR XXXIX, 5711-5717, at Tab 1. The court ordered he could opt out of LWOP on 5/28/09. TR XXIX, 4277.

[28] VHR 11, 2/01/12, 12:59:40 et seq. Judgment/Sentence Following Guilty Verdict, TR XXXIX, 5711-5717, at Tab 1.

[29] Transcript of Commonwealth's opening and mistrial, VHR 37, 6/8/09, 10:07:51-11:37:58, attached at Tab 3. See also, VHR 31, 6/29/09, 1:57:00 – 2:03:25; TR XXIX, 4332-4335 and 4337 et seq.; TR XXX, 4468-4470; Judge Ryan's Order, June 12, 2009, TR XXIX, 4343-4344, at Tab 4; VHR 10, 11/03/11, 12:57:54; Defendant's Motion to Dismiss Indictment, etc., October 12, 2011, TR XXXIV, 5016-5020, at Tab 5. Judge Castlen's Order, November 20, 2011, TR XXXIV, 5062, at Tab 6.

empaneled and sworn on June 8, 2009.[30] Prosecutor Todd Lewis launched the Commonwealth's opening statement, starting with the jail escape. Just as he began to tell the jury about the burglary of the Stevens home, the defense called a bench conference to inquire whether he intended to mention "other crimes" including the Keeling murder.[31] His response was curt and cryptic: "I intend to comply with the previous rulings of Judge Coleman in this matter."[32] Defense counsel argued the Commonwealth shouldn't mention Keeling's or Brady's murder because [after *Roark*] murder was not an element of capital kidnap and the prejudicial effect of murder evidence in the guilt phase would outweigh any probative value.[33] The court sustained appellant's objection.[34]

The Commonwealth proceeded to tell the jury that Reese and appellant kidnapped Keeling and drove him off in his own white truck.[35] Somewhere in New Mexico they turned off in the middle of nowhere. Appellant said he needed to pee and took the handcuffed Keeling with him. Reese was sitting in the driver's seat, and then … "he hears two gunshots, and then the defendant gets back in the truck…*only* the defendant gets back in the truck."[36] (emphasis in original). At this, Judge Ryan immediately called a second bench conference

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[30] VHR 37, 6/08/09, 9:59:20.
[31] VHR 37, 6/8/09, 10:08:59.
[32] VHR 37,6/8/09, 10:10:35.
[33] VHR 37, 6/08/09, 10:08:59.
[34] VHR 37, 6/08/09, 10:11:05.
[35] VHR 37, 6/8/09, 10:21:40.
[36] VHR 37, 6/8/09, 10:24:01.

and exclaimed, "Judge Coleman said that was not to be admitted!"[37] The Commonwealth retorted it had said exactly what Judge Coleman approved "from the bench," that "they stopped… he got out… there were gunshots."[38] The Commonwealth argued the only thing forbidden by Judge Coleman was saying the word "murder," and alluding to murder was approved.[39] Flabbergasted, the court snapped, "…the ruling was the killing would not come into [evidence], …did you read what I ordered?!"[40] The court turned to defense counsel pointedly, "Do you have a motion, Mr. Yustas?" And Yustas moved for mistrial.[41]

The trial was halted while everyone searched for orders on the subject.[42] Judge Roark's Order of 12/23/1998 and Judge Coleman's Order of 11/3/2000 were produced.[43] Roark's order shows two things clearly deleted and forbidden: 1) that charges were pending against appellant in Oklahoma when he escaped, and 2) that Tim Keeling was shot and killed. Coleman's 2000 order affirms the

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[37] VHR 37, 6/8/09. 10:24:34.
[38] VHR 37, 6/8/09, 10:24:34.
[39] VHR 37, 6/8/09, 10:24:34-10:26:13.
[40] VHR 37, 6/8/09, 10:25:44.
[41] VHR 37, 6/8/09,10:26:13.
[42] The judges whose orders were searched for and reviewed are as follows: 1) Judge Hugh Roark, who presided in the 1990's. *St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999); 2) Judge Janet Coleman, who presided over the 2001 trial. *St. Clair v. Com.*, 174 S.W.3d 474 (Ky. 2005); Special Judge Ann Shake, who replaced Coleman in December 2007. TR XXIII, 3438 and 3442; and Judge Stephen Ryan, who replaced Shake in April 2008. VHR 6, 4/28/08, 1:25:24.
[43] Judge Roark's Order of 12/23/98 [in pertinent part], TR XXIV, 3557-3560; Judge Coleman's Order of 11/2/00, TR XXIV, 3556; and Opinion and Order of Ann Shake, February 20, 2008, TR XXIV 3565 – 3568, at page 3567, all at Tab 7.

deletions in Roark's 1998 order and forbids introducing evidence that two shots were fired or Tim Keeling was killed.[44] Subsequently, the Commonwealth found a third order by Special Judge Ann Shake.[45] Shake's February 2008 order affirms Roark's and Coleman's previous rulings on the issue by noting without further comment that the issue had been ruled on and in the process matters had been deleted.[46]

The prosecutor persisted in arguing he had technically not violated Coleman's order because the order forbade saying "two shots were fired and Tim Keeling was shot," and that was not exactly what he'd said.[47] Judge Ryan pointed out, "But it can be inferred ...."[48] At this point the prosecutor interjected, "**Well. I always thought the ruling was strange about what could be inferred** [but] I thought I was following what I'd seen before."[49] Judge Ryan scolded that if the Commonwealth had questions about the prior rulings, "**maybe you should have talked to me**...."[50] The Commonwealth persisted, claiming that three judges and the Kentucky Supreme Court "by adoption" and possibly even Judge Ryan himself in a pretrial conference had

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[44] *Id.*
[45] VHR 31, 6/29/09, 2:05:00; See footnote 59, above.
[46] *Id.*
[47] VHR 37, 6/8/09, 11:04:38
[48] *Id.*
[49] *Id.* (emphasis added)
[50] VHR 37, 6/8/09, 11:03:07 (emphasis added)

previously ruled in accordance with its position [that only the word "murder" was prohibited].[51] The record demonstrates the contrary.

Judge Roark clearly marked out, deleted and forbade any evidence that two shots were fired or that Keeling was killed. Judge Coleman, from the bench stated it was "unlikely" she would change Roark's previous ruling, and she did not change that ruling.[52] Nor did Judge Shake. While *Bullitt II* and *Hardin I* cited by the Commonwealth[53] support introduction of Keeling kidnap 404(b) evidence, neither case supports introduction of prejudicial uncharged murder evidence during the guilt phase of a kidnap trial.

The Commonwealth eventually admitted it could see the "two shots" [were inadmissible], yet persisted in arguing that the "two shots" could come in under "law of the case."[54] The Commonwealth asked for an admonition, and the court asked, "How's an admonition going to correct the fact that he killed the guy? …You said [appellant] gets back in the truck. How [would the jury] not infer he murdered him?" Judge Ryan ruled further that no evidence regarding Keeling's body later being found could come in. The court ordered a

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[51] *Id.*
[52] Judge Coleman's 11/2/00 Order, TR XXIV, 3556; VHR 2, 8/29/00, 14:21:33 – 1:42:33
[53] VHR 37, 6/8/09, 11:35:41
[54] VHR 37, 6/8/09, 11:07:01 The *Bullitt I* opinion is not "law of the case" in a Hardin County retrial.

mistrial, saying, "You shouldn't have done it. I'm not saying it was misconduct; I'm saying you shouldn't have done it."[55] His written order states as follows:

> As stated at the time of the mistrial, the Court finds that the Commonwealth had a good faith basis in believing that the evidence would be admitted based upon the prior rulings of other judges and the fact scenario laid out in the Supreme Court case, which reversed Mr. St. Clair's prior kidnapping conviction. However, the Court is of the opinion that granting a mistrial in this case was a manifest necessity.[56]

The Commonwealth knew its behavior invited a mistrial.

As demonstrated above, the prior rulings of Roark, Coleman, and Shake clearly prohibit mentioning that two shots were fired or that Keeling was killed. *Hardin I* doesn't even touch on the issue presented here and provides no authority for introducing Keeling murder evidence during the guilt phase of a kidnap trial. *Hardin I,* as argued below in issue #17, expressly holds and directs that on remand victim-not-released-alive cannot be used as an aggravator for capital kidnap, that capital kidnap requires as an aggravator the *murder* of the victim before death may be imposed:

> If the evidence on retrial is substantially the same, the jury shall be instructed that capital punishment may not be imposed unless the jury finds that St. Clair murdered Frank Brady during the course of the kidnapping.

Hardin I, 174 S.W.3d at 483.

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[55] VHR 37, 6/8/09, 11:07:16 - 11:10:31.
[56] Judge Ryan's Order, June 12, 2009, TR XXIX, 4343-4344, at Tab 4.

St. Clair v. Commonwealth, 174 S.W.3d 474, 483 (Ky. 2005).[57]

No one involved in the second or third Hardin County trials seems to have noticed the remand direction in *Hardin I*. Everyone appears to have believed that under *Hardin I* death could be imposed based on the bare fact that the victim was not released alive. But even when *Hardin I* is correctly understood, it provides no authority for introducing prejudicial 404(b) prior uncharged murder evidence during the *guilt phase* of a capital kidnap trial. The Commonwealth "shouldn't have done it." It was misconduct. The court was correct to grant a mistrial but incorrect in allowing any further proceedings.

The Double Jeopardy Clause of the 5th Amendment protects a criminal defendant from repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 (1976). When the defendant himself has elected to terminate the proceedings, the government is not barred from retrying him. *United States v. Tateo*, 377 U.S. 463, 467 (1964). But a defendant who moves for a mistrial may invoke the bar of double jeopardy in a second effort to try him "when the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). The exception applies here because neither the prior trial court rulings nor *Hardin I* provide any basis whatsoever for

[57] As argued below in issue #17, the trial court failed to instruct on murder as an aggravator, despite the clear directive to do so in *Hardin I*.

broadcasting prejudicial 404(b) uncharged murder evidence during opening statement in a capital kidnap trial. The Commonwealth knew –or should have known—its behavior would provoke a motion for mistrial. This can be inferred from the Commonwealth's admission it had "doubts," as well as on its other conduct and statements.

The Commonwealth admitted it had "doubts" about revealing the two shots fired based on Coleman's order. Yet the Commonwealth intentionally hid those doubts at the first bench conference. The fact that the Commonwealth said it would follow Judge Coleman's order --while at the same time concealing doubts about that order-- proves that what the Commonwealth did was an intentionally covert tactical action. Afterward when the Commonwealth kept saying "I didn't say '*murder*'…." the court finally lost patience, "Two shots and got back in the truck? Be *honest*, Mr. Lewis!"[58] The court is on record openly accusing the prosecutor of dishonesty. And that taint of dishonesty –called out by the court—is the difference between mere overreaching and an intentional invitation to mistrial. The Commonwealth concealed doubt at a time when an honest prosecutor would have expressed it. Moments before at the bench the defense asked if the Commonwealth planned to say anything about the Keeling

[58] VHR 37, 6/08/09, 11:06:40

murder. That was the moment when an honest prosecutor would have expressed doubts about Coleman's order.

Possibly, despite its protestations of innocence,[59] the Commonwealth was trying to cause a mistrial in order to get rid of Judge Ryan, whose senior status would end five months later.[60] Ryan had refused to grant the Commonwealth's requested method of voir dire,[61] denied its motion to exclude all of appellant's mental health evidence,[62] refused to grant its motion for extra courtroom security,[63] reminded the Commonwealth it had attempted, in another case, to exclude the death penalty,[64] and inspired the appellant to say he was thinking to go to trial in front of this judge without a jury.[65] By causing the mistrial, the Commonwealth succeeded in delaying the trial long enough to require a new judge, a more favorable judge who conducted voir dire the way the Commonwealth wanted and tolerated even more prejudicial 404(b) uncharged murder evidence than had caused the mistrial.[66]

The Commonwealth's intentions must be inferred from its actions and the consequences of those actions. "[A] person is presumed to intend the

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[59] Commonwealth's Response to Def.'s Motion, etc. TR XXX, 4464 – 4465, at Tab 8.
[60] Judge Castlen first appeared November 30, 2009. VHR 7, 11/30/09, 1:41:39.
[61] VHR 6, 4/28/08, 1:38:32 – 1:39:38
[62] VHR 6, 6/02/08, 1:08:13
[63] VHR 6, 6/02/08, 1:10:01
[64] VHR 6, 6/02/08, 1:44:19, referencing *Commonwealth v. Ryan*, 5 S.W.3d 113, 114 (Ky. 1999), abrogated on other grounds *by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).
[65] VHR 6, 6/02/08, 1:51:35
[66] VHR 8, 1/21/11, 2:18:13; VHR 10, 11/03/11, 12:57:54 – 1:39:55

logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the [behavior in question]." *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997); see also *McKinney v. Commonwealth*, 60 S.W.3d 499, 503 (Ky. 2001); and *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996). The Commonwealth announced 404(b) murder evidence during opening statement knowing it was doubtful to do so, and succeeded in getting the trial delayed long enough to get a new jury and a more favorable judge. At the bench despite doubts the Commonwealth *hid* its intention to inform the jury appellant murdered Tim Keeling. Afterward all it could do was claim repeatedly that it hadn't said the *word* "murder" and thought that was all right. This court must presume under *Parker, McKinney*, and *Partin,* above, that this was prosecutorial bad faith, readily inferable from the prosecutor's actions and the consequences of those actions on this record. Jeopardy attached when the jury was impaneled and sworn.[67] *Crist v. Bretz,* 437 U.S. 28, 36 (1978); *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569 (1977); *Cardine v. Commonwealth*, 283 S.W.3d 641, 645 (Ky. 2009).

Under Kentucky law, a showing of bad faith or overreaching is sufficient to bar retrial. Section 13 of the Kentucky Constitution states in pertinent part "[n]o person shall, for the same offense, be twice put in jeopardy

[67] VHR 37, 6/08/09, 9:59:20.

of his life or limb...." This court should reverse, dismiss and forbid retrial under Kentucky law, which bars retrial when a mistrial is caused by prosecutorial "bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." *Martin v. Commonwealth*, 170 S.W.3d. 374, 378 (Ky. 2005) [overruled on other grounds in *Patterson v. Commonwealth*, 2010 WL 1005976 (Ky. 2010)(Unreported)[68]], *quoting, Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989); see also KRS 505.020, which codifies Kentucky's constitutional protection against double jeopardy.

Based on the intentional misconduct shown here, retrial is also forbidden under the federal constitution. Trying appellant a third time violated double jeopardy. *Renico v. Lett*, 559 U.S. 766 (2010) (double jeopardy to retry defendant after judge declared mistrial for manifest necessity). The 5th Amendment states in pertinent part "[n]o person shall... be subject for the same offence to be twice put in jeopardy of life or limb..." The double jeopardy clause is applicable to the states by incorporation into the 14th Amendment of the United States Constitution. *Crist v. Bretz*, 437 U.S. 28, 31 (1978) (citing *Benton v. Maryland*, 395 U.S. 784, 794-795 (1969)). This court should reverse and dismiss these convictions and sentences under the law cited above and forbid retrial due to double jeopardy.

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[68] Appellant is not relying on *Patterson;* hence no copy is attached of this unpublished case.

VOIR DIRE AND JUROR ISSUES

2. The trial court's arbitrary dismissal of Michael Smallwood as a potential juror violated equal protection, due process, and a fair trial.

Preservation. This issue is unpreserved.

Facts and Argument. The trial court questioned Michael Smallwood, verifying that Smallwood understood he was under oath and confirming his identity.[69] The court then asked if he could consider all four penalties (20-50 years, life, life without parole for 25 years, and death).[70] Smallwood stared at the penalties for about half a minute and then told the judge, "Number one."[71] The trial court then explained that he was not asking for a decision right now, but whether Smallwood could consider all four penalty ranges.[72] Then, instead of giving the attorneys a chance to question Smallwood, as was the custom before and after this prospective juror, the trial court excused Smallwood without further comment.[73]

A trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007) (citing *Adkins v. Commonwealth*, 96 S.W.3d 779, 795 (Ky. 2003);

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[69] VHR 40: 1/6/12; 9:43:20.
[70] VHR 40: 1/6/12; 9:43:33.
[71] VHR 40: 1/6/12; 9:43:33-9:44:05. Presumably, number one refers to the penalty of a 20-50 years prison term.
[72] VHR 40: 1/6/12; 9:44:10.
[73] VHR 40: 1/6/12; 9:44:30.

Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002)). "The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Id.* Further, "[t]here is no 'magic question' that can rehabilitate a juror as impartiality is not a technical question but a state of mind." *Id.*, (citing *United States v. Wood*, 299 U.S. 123, 145 (1936); *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky. 1958)). The abuse of discretion standard requires this court to determine if the trial had a sound legal basis for his or her ruling. *Id.* And "[i]f a judge errs on a finding of fact, he must be clearly erroneous or there is no error; if error is premised on incorrect application of the law, a judge abuses his discretion when the legal error is so clear that there is no room for the judge to have ruled any differently." *Id.*

The trial court abused its discretion in two ways when it struck Smallwood because: 1) it had no sound legal basis to excuse him; and 2) it failed to let the attorneys question him.

First, Smallwood was presumably qualified to serve as a juror. Potential jurors include "all people filing a Kentucky resident individual tax return, in addition to registered voters and licensed drivers over the age of 18."[74] Further, to qualify for jury service, a person must: 1) Be 18 years of age or older; 2) Be a

[74] "How are jurors selected for service?"; see Kentucky Court of Justice Web Site > Jury Duty > Frequently Asked Questions; http://courts.ky.gov/juryduty/Pages/FAQS.aspx, last visited May 20, 2013.

United States citizen; 3) Be a resident of the county in which the case is to be tried; 4) Be able to speak and understand English; 5) Not have been convicted of a felony, unless pardoned or had his or her civil rights restored by the governor or other authorized person of the jurisdiction in which he or she was convicted; 6) Not be currently under indictment; and 7) Not have served on a jury within the past 24 months.[75] There was no evidence Smallwood did not meet all these qualifications.

It appeared that Smallwood either had trouble hearing or understanding the trial court; however, even assuming that Smallwood was excused because he had some non-disclosed handicap, the trial court violated Smallwood's and appellant's rights by summarily excusing Smallwood.

The trial court did not allow questioning or state on the record why it excused Smallwood, so it is difficult to determine if Smallwood was part of a protected class deserving of heightened scrutiny analysis. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986) (restricting the use of peremptory challenges on the basis of race); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) (extending *Baston's* federal equal protection prohibiting peremptory strikes based solely on race to prohibit peremptory strikes based solely on gender-based) or whether

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[75] "Who is qualified to be a juror?"; see Kentucky Court of Justice Web Site > Jury Duty > Frequently Asked Questions; http://courts.ky.gov/juryduty/Pages/FAQS.aspx, last visited May 20, 2013.

Smallwood was entitled to "rational basis" review due to his age, disability, etc. *J.E.B.*, 511 U.S. at 143 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 439-442 (1985); *Clark v. Jeter*, 486 U. S. 456, 461 (1988).

The rationale for the heightened scrutiny is because "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.*, 511 U.S. at 128 (citations omitted). The Equal Protection Clause of the 14th Amendment states, no state shall "deny to any person within its jurisdiction the equal protection of the laws," which essentially directs that all persons similarly situated should be treated alike.

In applying heightened scrutiny, it is difficult to argue that the trial court's actions in excusing Smallwood were suitably tailored to serve a compelling state interest. This difficulty is exacerbated by the trial court's failure to state on the record its rationale for excusing Smallwood. Without more, Smallwood was treated differently by being the only potential juror summarily excused without reason.

Even if Smallwood had some handicap and belonged to a class not subject to heightened scrutiny, the trial court abused its discretion, and violated the Americans with Disabilities Act of 1990 ("ADA", 42 U.S.C. Sec. 12101 et seq.), by not offering any accommodations to Smallwood. Under the ADA, "no qualified individual with a disability shall, by reason of such disability, be

excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *People v. Green*, 148 Misc. 2d 666, 670 (N.Y. Co. Ct. 1990) (striking a juror solely for her deafness violates her right to equal protection under New York's constitution).

Kentucky also recognizes equal protection rights for its citizens. §§ 1, 2, & 3, Ky. Constitution. In this case, there was no rational basis for the trial court to dismiss Smallwood based on any real or perceived handicap. There was no rational basis for the court to fail to state why Smallwood was being excused. And certainly there was no rational basis to excuse Smallwood without first asking him if he could be accommodated. Smallwood never indicated that he was unfit to serve. His equal protection rights were violated.

Further, by failing to allow the attorneys to question to Smallwood before excusing him, the trial court denied appellant a fair trial in violation of the 6th and 14th Amendments of the United States Constitution. *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991). *Uttecht v. Brown*, 551 U.S. 1, 20 (2007) suggests that an adequately long and a "diligent and thoughtful voir dire" are required before affording the trial court a broad discretion, at least in a death case. There was no diligent and thoughtful voir dire. The trial court's questioning lasted a little over one minute. The trial court abused its discretion.

The trial court erred to appellant's substantial prejudice and denied him equal protection and due process of law by excusing Smallwood without justification. §§ 2, 3, 7, & 11, Ky. Const.; 5th, 6th & 14th Amends., U.S. Const. A new trial is required.

3. The trial court erred in dismissing Angela Hobson as a potential juror.

Preservation. This issue is preserved. The trial court excused this juror[76] over defense counsel's objection.[77]

Facts and Argument. When the trial court asked Juror Angela Hobson if she could consider the entire range of penalties, she initially stated she would have trouble with the death penalty; that she did not think she could give the death penalty, but that there were some circumstances where she could give the death penalty, e.g., cases involving children or the elderly.[78] She explained she would need to know more about the case and that she could consider the death penalty if she was convinced beyond a reasonable doubt that appellant kidnapped someone and did not release that person alive.[79] She verified that the

[76] VHR 41: 1/6/12; 12:30:30.
[77] VHR 72: 1/5/12; 15:00:02.
[78] VHR 72: 1/5/12; 14:45:10.
[79] VHR 72: 1/5/12; 14:46:10.

judge was not making her say that and that she could assure the judge that she would consider the death penalty along with the other penalties.[80]

While she stated she would probably impose one of the first three penalty penalties (non-death) automatically, she explained that she would need to know the facts first and need to know more.[81] She repeatedly stated she could consider the entire range of penalties and would not refuse to consider any penalties.[82]

Under prosecution questioning, Hobson conceded that she did not agree with the death penalty, that no one has a right to take someone else's life;[83] however, she reiterated that for "old people" and "children" victims, she could "say death penalty, no problem."[84] After being told that the victim was intentionally murdered, Hobson responded that she could consider the entire penalty range.[85] Finally, over defense counsel's objections[86] the prosecutor asked Hobson, "could you envision yourself under any circumstances, including, you know, the ones you'll hear, any circumstances at all, actually being there to vote and sign your name as the person saying, 'I'm condemning

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[80] VHR 72: 1/5/12; 14:46:55.
[81] VHR 72: 1/5/12; 14:47:05, 14:47:20, 14:47:27, 14:54:44.
[82] VHR 72: 1/5/12; 14:48:23.
[83] VHR 72: 1/5/12; 14:51:48.
[84] VHR 72: 1/5/12; 14:52:18.
[85] VHR 72: 1/5/12; 14:55:50.
[86] VHR 72: 1/5/12; 14:57:23, 14:57:33, 14:57:58.

him to death'?"[87] Hobson stated it is hard for her to answer that, and then stated, "No."[88] The trial court asked her if there were no circumstances where she could impose the death penalty.[89] She answered other than for elderly or child victims.[90] The trial court eventually struck her, stating that Hobson was being struck for cause because she would only consider death if the victim were a child or elderly, which did not fit the pattern of this case.[91]

A defendant on trial for his life has a right to an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J., concurring).

The U.S. Supreme Court has limited "a state's power broadly to exclude jurors hesitant in their ability to sentence a defendant to death." *Morgan v. Illinois*, 504 U.S. 719, 732 (1992). Not "all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own

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[87] VHR 72: 1/5/12; 14:55:50.
[88] VHR 72: 1/5/12; 14:58:17.
[89] VHR 72: 1/5/12; 14:58:52.
[90] VHR 72: 1/5/12; 14:59:04.
[91] VHR 41: 1/6/12; 12:30:30.

beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176 (1986). The U.S. Supreme Court explained this principle in *Gray v. Mississippi*, 481 U.S. 648, 658-659 (1987), stating: "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' ... To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the defendant.'"

A trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007) (citations omitted). "The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Id.* Further, "[t]here is no 'magic question' that can rehabilitate a juror as impartiality is not a technical question but a state of mind." *Id.*, (citing *United States v. Wood*, 299 U.S. 123, 145 (1936); *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky. 1958)). The abuse of discretion standard requires this court to determine if the trial court had a sound legal basis for his or her ruling. *Id.* And "[i]f a judge errs on a finding of fact, he must be clearly erroneous or there is no error; if error is premised on incorrect application of the law, a judge abuses

his discretion when the legal error is so clear that there is no room for the judge to have ruled any differently." *Id.*

This court has held the Commonwealth is only "entitled to have excused for cause a person who has such conscientious objection to the death penalty that he would never, in any case, no matter how aggravated the circumstance, vote to impose the death penalty." *Grooms v. Commonwealth*, 756 S.W.2d 131, 137 (Ky. 1988). *See also, Witherspoon v. Illinois*, 391 U.S. 510 (1968). The constitutional "standard is whether the juror's views could 'prevent or substantially impair the performance of his duties as a juror in accord with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The "quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial jury' consists of." *Id.*, 469 U.S. at 423. If a juror is able to follow the oath and the instructions, removal for cause violates the defendant's constitutional rights. *Gray v. Mississippi, supra.*

In this case, Hobson had indicated many times that while it was difficult, she could consider the death penalty, and that she could consider the entire penalty range, with her decision to be based on the facts of the case. Hobson was never asked if she could set aside her own beliefs in deference to the rule of the law. *See Lockhart, supra.* It was not until the prosecutor asked what she meant by "consider" and equated "consider" to being the foreperson signing

her name to condemn appellant to death that Hobson averred she could not do that.

Yet the ability to serve as foreperson and to sign a death verdict is not a requirement for service as a juror on a capital case. As has already been stated, the *Wainwright* standard is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, 469 U.S. at 424. The ability to serve as a foreperson heightens the death qualification standard. In addition, it implies to jurors that a foreperson's role as to the imposition of the death penalty is somehow more important, or more serious, than that of the other jurors. The foreperson is simply signing off on a form indicating the twelve jurors unanimously agreed on the death verdict. It was prejudicial for the foreperson question to be used to gauge Hobson's views on the death penalty. *Morgan v. Illinois*, 504 U.S. at 732.

The improper excusal of Hobson denied appellant his constitutional right to an impartial jury. §§ 2, 7, 11, & 17, Ky. Const.; 6th, 8th & 14th Amends., U.S. Const. A new trial is required.

4. **Forcing appellant to trial before a jury paid less than minimum wage denied him due process and a fair and impartial jury.**

Preservation. This issue is preserved *pro se*.[92]

Facts and Argument. Because the Commonwealth caused and suffered the jury's work to occur and was completely aware it was occurring, the jury's service in this trial was "work" as defined and covered by minimum wage law. Under 803 KAR 1:005: "Mere knowledge by an employer of work done for him by another is sufficient to create the employment relation under KRS Chapter 337." In 2012, KRS 337.275 required Kentucky employers to pay minimum wage of $7.50 per hour. Minimum wage laws are designed to fix "... a floor below which wages could not fall [so] that individuals ... would be guaranteed an income on which one could maintain a minimum living standard...." S.REP. No. 440, 95th Cong., 1st Sess. 2–3 (1977). The payment of minimum wage cannot be waived; it is public policy: Parties cannot contract to work for less than the minimum wage rate. *Wirtz v. Leonard*, 317 F.2d 768, 769 (5th Cir. 1963).

Jurors are at least as essential to the justice system as defense counsel. And when essential justice system workers receive inadequate pay, the

[92] Pro se motion to pay jury minimum wage, TR XXIII, 3379, filed 12/7/07; Motion denied by Order 2-1-08, TR XXIV 3512, citing KRS 29A.170 and OAG 76-531 (jurors are not employees). Opinion and Order of 2/7/08, TR XXIV, 3503-3514, at 3514.

defendant's constitutional rights are violated. *Martinez - Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (inadequate defense counsel pay is sufficient to establish ineffective assistance of counsel); *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (bid system caused defense attorneys to be so overworked that it violated indigent defendant's right to due process and right to counsel); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (public defender workloads created rebuttable presumption of ineffective assistance of counsel); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004) (defendants deprived of constitutional right to counsel could not be held more than seven days). By analogy, appellant's constitutional rights were violated when–*over his objection*— he was tried by a jury forced to work for legally inadequate pay. Appellant's jury's lack of adequate pay violated his constitutional right to due process and a fair and impartial jury. *See also*, *State v. Citizen*, 898 So.2d 325, 339 (La. 2005) (trial judge may halt prosecution until adequate funds become available to ensure indigent defendants' constitutionally protected right to counsel) and *State v. Wigley*, 624 So.2d 425 (La. 1993) (requiring attorneys to defend without compensation violated their right to due process). See *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011) (discussing when a state law violation also violates due process). Retrial is required before a jury that is paid at least minimum wage.

GUILT PHASE ISSUES

5. Admitting irrelevant and unduly prejudicial evidence of Brady's murder during the guilt phase violated appellant's due process right to fundamental fairness.

Preservation. This issue is preserved.[93]

Argument. Evidence of Brady's murder was irrelevant and unduly prejudicial to proving the "not released alive" element of kidnapping. "Evidence which is not relevant is not admissible." KRE 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. A fact of consequence may be an element of the offense or something that disproves a defense. *Little v. Commonwealth*, 272 S.W.3d 180, 187 (Ky. 2008). Evidence is relevant if it makes any showing of an increase in probability. *Id.* at 187. The standard of review for evidentiary issues is abuse of discretion, which occurs when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Montgomery v. Commonwealth*, 320 S.W.3d 28, 34 (Ky. 2010).

Defense counsel moved to exclude any evidence that Brady was murdered.[94] Counsel noted the Hardin Indictment did not include a murder

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[93] Defense motions: TR XXVII, 4017-4020; TR XXX, 4490-4498. Orders: TR XXIX, 4212-4213; TR XXXII 4666-4667. See Tab 9.
[94] TR XXVII, 4017-4020; TR XXX, 4494-4495.

charge, which was the subject of the Bullitt County Indictment. Further, the prosecution only had to prove that Brady was not released alive. Counsel argued "the Commonwealth can fully meet its burden by simply introducing a death certificate."[95] Thus, evidence of Brady's murder "must be barred as being totally irrelevant to the culpability issues at bar."[96]

Reversible error occurred when the judge denied these motions.[97] The fact of consequence at issue in the guilt phase was Brady's death. Whether Brady died of a heart attack or a gunshot did not make the fact of his death more or less likely. While the manner of Brady's death would certainly become relevant in the penalty phase for determining the appropriate level of punishment, it is simply inapposite in the guilt phase. *See Salinas v. Commonwealth*, 84 S.W.3d 913, 919-920 (Ky. 2002).

Should this court disagree and find some degree of relevance, Brady's murder should have been excluded as unduly prejudicial. KRE 403 states that "[a]lthough 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." Unduly prejudicial evidence is that which

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[95] TR XXVII, 4018; TR XXX, 4494.
[96] TR XXX, 4494.
[97] TR XXIX, 4212-4213; TR XXXII, 4666-4668.

is unnecessary and unreasonable. *Mayo v. Commonwealth*, 322 S.W.3d 41, 50 fn. 9 (Ky. 2010). The court must consider the probative and prejudicial nature of the evidence and then determine whether the harmful effects substantially outweigh the probative worth. *Little*, 272 S.W.3d at 187.

Introducing Brady's murder in the guilt phase was unnecessary and unreasonable. Counsel argued that the "introduction of highly inflammatory evidence insinuating that Mr. St. Clair committed an uncharged murder is completely unnecessary."[98] The evidence truly turned out to be highly inflammatory. In chilling detail the jury heard Reese recount the binding and execution of Brady when a death certificate alone would have satisfied the "not released alive" element. Instead of a simple sheet of paper, the jury heard a convicted killer relate a cold-blooded murder.[99] The unduly prejudicial effect of these details on appellant substantially outweighed any probative value they offered.

In *Meyers v. Commonwealth*, 381 S.W.3d 280, 285 (Ky. 2012), this court held that conduct which occurs after a crime is irrelevant: "Appellant's conduct after he came into possession of the gun—i.e., pointing the gun at S.C. and telling her he planned to shoot the police—is irrelevant to the crime charged [felon in possession of a firearm]." Just as Meyers' conduct after he came into

[98] TR XXVII, 4018.
[99] VHR 43, 1/11/12, 1:24:05-1:25:44.

possession of the gun was irrelevant to prove the bare elements of gun possession, the manner in which Brady was not released alive (appellant's conduct just prior to when Brady died) is irrelevant to the simple elemental fact that he did not survive the kidnapping. All the murder evidence was not only irrelevant but also more prejudicial than probative.

Admission of Brady's murder in the guilt phase was fundamentally unfair and violated 5th and 14th Amendment due process. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (*citing, Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). Reversal is required.

6. A new trial is required due to introduction of excessive KRE 404(b) evidence.

Preservation. This issue is preserved. The prosecution filed KRE 404(c) notice regarding the abduction and murder of Keeling.[100] Defense counsel filed a motion objecting to the "Commonwealth's proposed evidence relating to Tim Keeling" and a new trial motion that objected to allowing the full evidence of Tim Keeling's murder.[101] The judge denied both motions.[102]

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[100] TR XXXIV, 5057-5060.
[101] TR XXXV, 5145; TR XXXIX, 5690-5691. See Tab 10.

Facts. A significant portion of the prosecution's proof in the guilt phase related to Tim Keeling. Reese offered detailed testimony regarding his kidnapping and killing.[103] Reese said appellant came west with him and still had the gun in Colorado.[104] Reese said appellant pulled the gun on Keeling and handcuffed him.[105] They drove through the night; just before daylight, appellant told Reese to pull over because he had to use the bathroom and told Keeling, "You better use it, too." Reese testified he heard a gunshot, heard Keeling holler "Oh God," and heard another gunshot.[106] Reese said appellant got back in the truck alone with the handcuffs and said he had to shoot Keeling twice. He said shooting him behind the left ear was his "trademark." Reese said appellant said, "[k]illing people is like killing dogs; after you kill the first one, the next one is easy." Reese said appellant thought killing Keeling "was a joke." It made him "excited." Reese said as they drove off, appellant went through Keeling's wallet, tore up a picture of his little girl, and said, "[t]here's a bitch that's going to grow up without a daddy;" then he threw the picture out the window.[107]

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[102] TR XXXV, 5145; TR XXXIX, 5703. See Tab 10.
[103] VHR 43, 1/11/12, 11:47:00-11:55:00.
[104] VHR 43, 1/11/12, 11:45:43.
[105] VHR 43, 1/11/12, 11:48:19.
[106] VHR 43, 1/11/12, 11:50:36.
[107] VHR 43, 1/11/12, 11:52:30.

Keeling's widow, Lisa Hill, testified about their life together.[108] Her heart-wrenching, highly prejudicial testimony is detailed in Issue #10, below. Toby Dolan, a retired New Mexico State Police Trooper, testified about his role investigating the discovery of Keeling's body.[109] Dolan painted a gruesome picture of Keeling's death. He said there was a lot of blood on Keeling's clothing and a blood trail in the grass, suggesting that Keeling dragged himself, bleeding, through the grass before he finally died, curled in what Dolan described as a "fetal position."[110] Calvin Hemphill, a retired Denver Police Officer, testified about his investigation of Keeling's stolen truck.[111]

Argument. "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). "The fundamental purpose of KRE 404(b) is to prohibit unfair inferences against a defendant." *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007). To effectuate this purpose, KRE 404(b) functions as a rule of exclusion subject to certain, specific exceptions. *Sherroan v. Commonwealth*, 142 S. W. 3d 7 (Ky. 2004).

The significance of its exclusionary nature to those accused of crimes is apparent. The "fundamental demands of justice and fair play" generally exclude

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[108] VHR 44, 1/12/12, 11:06:00-11:23:15.
[109] VHR 44, 1/12/12, 11:25:00-11:45:00.
[110] VHR 44, 1/12/12, 11:29:51
[111] VHR 44, 1/12/12, 11:49:13-11:56:35.

prior bad acts: "[u]ltimate 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." *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982)(*reaffirmed by Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007)). Therefore, the exceptions to the general rule of exclusion "should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Clark*, 223 S.W.3d at 96(quoting *O'Bryan*, 634 S.W.2d at 156). When considering the introduction of prior bad acts, a court must balance the relevance and probative value of the prior bad acts with their prejudice. *Meece v. Commonwealth*, 348 S.W.3d 627, 662 (Ky. 2011)(citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889-891 (Ky. 1994)).

This court has never explicitly approved the introduction of the Keeling murder in the Hardin County kidnapping case. While appellant acknowledges this court's ruling in the Bullitt County murder case (*Bullitt I*, 140 S.W.3d at 535-536), appellant asserts that reversible error occurred in this Hardin County trial. First, the testimony of the New Mexico officer, the Denver officer, and Lisa Hill was not relevant. Their testimony did not relate to a fact of consequence so it did not tend to make it more likely that appellant kidnapped Brady. Second, their testimony was not probative to establish that appellant murdered Keeling. While Lisa testified about what a great man Keeling was and

Officer Hemphill testified about Keeling's truck and Trooper Dolan testified about the New Mexico crime scene, none of this testimony connected appellant to Keeling's disappearance in Denver or his murder in New Mexico. Third, the unduly prejudicial nature of this testimony substantially outweighed the non-existent or minimal relevance of their testimony.

Likewise, Reese's testimony on the Keeling matter should have been excluded. To the extent Reese can be believed, he was the only witness to what happened to Keeling. Reese faced the death penalty in Oklahoma and Kentucky and substantial prison time in California, which gave him an overriding interest to cooperate in any way he could with anyone who would listen. The horrendous story the jury heard from a desperate man unduly prejudiced appellant. This undue prejudice culminated near the climax of the prosecutor's guilt phase closing argument:

> Why, if all you need is a truck, if all you need is a vehicle, why carjack? Why kidnap? Do you remember when Dennis Reese talked about on the first night after they got out of Bryan County Jail that he was going to hotwire a tractor? How'd that work out? He didn't know how to hotwire a tractor. He couldn't even realize, right away, that there wasn't even a battery in the tractor. So stealing a vehicle by Dennis Reese hotwiring, that's not gonna work. So the next step is, we're going to steal a vehicle by putting a gun to somebody's head. How'd that one work out? Well, they did get a truck that night and they did get away from there, but what got left behind? Witnesses.
>
> So by the time it's in the middle of nowhere in New Mexico, St. Clair has already figured out, you know, this ain't his first rodeo, he's got it figured out by now. He needs to not leave witnesses behind. So the driver and owner of that pickup truck gets marched out into the

> woods. Why kill him? [Picks up picture of Tim Keeling to hold for the jury to see.] Why kill him? Because even though it's out in the middle of nowhere, leaving him out there, he's eventually going to get to help. Remember it was just the next morning that the highway patrol folks saw this body [Picks up another picture; this one of Tim Keeling's dead body.] out in New Mexico. So you can't just leave him on the side of the road. You've got to march him off into the woods. Dead men tell no tales.
>
> You've got to erase those obstacles if you're Michael Dale St. Clair. Then why, why do we then have this leisurely trip across into Louisiana. They are shopping. They're dancing. They're drinking. They're going up to Indiana. They're going down to Bullitt County. They're stopping at rest areas. They're eating. How can you be so leisurely about it when they've stolen the truck? When they've killed a man? Because they know. Dennis Reese knows because he was in the truck. But the defendant knows because he walked Tim Keeling out into the woods, and he knows Tim Keeling can't identify him. How does he know that? Because he's the one that put two bullets in him and left him to bleed out.[112]

Any probative value the Keeling murder details offered were substantially outweighed by their unduly prejudicial effect on appellant.

The excessive amount of improper KRE 404(b) evidence regarding the kidnapping and murder of Keeling was so fundamentally unfair that it violated 5th and 14th Amendment due process. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia,* 442 U.S. 95, 97 (1979); *Payne v.*

[112] VHR 49, 1/19/12, 1:18:05-1:21:32.

Tennessee, 501 U.S. 808, 825 (1991) (*citing, Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). Due process requires reversal.

7. **Mistrial should have been granted due to violations of KRE 401, 402, 403 and 404(b) when the jury was told 1) that before his escape appellant was considered a "max" security risk, 2) that he was already wanted for murder, and 3) he was a danger even to the friends who sheltered him.**

Preservation. As argued below appellant moved for mistrial after statements two, three, and four. Only as to **statement one** is this issue unpreserved.

Facts and Argument. Statement one was introduced when the Commonwealth read to the jury from appellant's supposedly redacted prior 2001 testimony that before his 1991 escape appellant was "in isolation," and didn't get yard time with other inmates because "I was considered a max after such a conviction."[113] The court said the fact he was considered a max was "suggestive" and told the Commonwealth "watch it."[114]

The trial court erred by failing to subject appellant's prior testimony to "the rigors" of KRE 401, 402, 403, and 404(b). Where value is slight and prejudice great, other uncharged bad acts must be excluded. *Chumbler v. Commonwealth,* 905 S.W. 2d 488, 494, (Ky. 1995). In addition, KRE Rules 401 and 403 "clearly apply" to party-opponent admissions. *Brown v. Commonwealth*,

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[113] VHR 48, 1/18/12, 8:58:14 – 8:39:18.
[114] VHR 48, 1/18/12, 9:00:01 et seq.

313 S.W.3d 577 (Ky. 2010)*; see also, Aliotta v. National Railroad Passenger Corp.*, 315 F.3d 756, 763 (7th Cir. 2003).

Statement one (that he was considered "max") and two (that he was wanted for murder) informed the jury appellant was an extremely dangerous convicted murderer. Neither the 5th Amendment nor the KRE 801A(b)(1) hearsay rule exclude a party's own out-of-court statement. *Brown v. Commonwealth*, 313 S.W.3d 577, 606 (Ky. 2010). But it should be considered together with the other repeated references, not simply to the fact he'd previously been incarcerated. *Cf.*, *Webb v. Commonwealth*, 387 S.W.3d 319 (Ky. 2012) (holding prejudice from evidence prison guards knew the defendant *from prison* did not outweigh the probative value of the evidence, which explained how they identified him); *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011)(error not palpable where reference to earlier incarceration and prior trial were brief); and *Unstill v. Commonwealth*, 337 S.W.3d 576, 591 (Ky. 2011) (statements of detective indicating that he had known the defendant for years and found defendant in "a database," violated KRE 404(b), but no mistrial was warranted because the reference was "fleeting" and the detective didn't say it was a "criminal" database).

Counsel moved for mistrial after **statement two**. Trooper Bennett testified that FBI agent Phil Lewter told him appellant was "wanted for murder" and "numerous other crimes." Lewter told Bennett "[t]hey'd got a call

from Oklahoma or somebody once they got to hitting the NCIC system."[115] The defense immediately moved for mistrial and refused an admonition.[116] Over objection, the court admonished the jury to "disregard the last comments of the witness, the comment that the defendant was wanted for a crime and other charges. You shall not discuss this in the jury room and disregard that the comment was even made."[117] The court told Bennett not to tell the jury [further] what appellant was wanted for.[118] Counsel pointed out whether the jury thought it was the Keeling murder or some other murder, it was just as prejudicial.[119] In *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006) an admonition cured a reference to Gray's criminal past when In this case appellant *refused* the admonition.

Statement three. Oklahoma State Bureau of Investigation agent Perry Unruh testified that "we" (the police) felt even St. Clair's close friends, the Reeves, who gave him shelter and harbored him after his return from Kentucky to Oklahoma, "could be in danger."[120] Counsel moved for mistrial and/or an admonition on the grounds this was part of an attempt to make appellant

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[115] VHR 45, 1/12/12, 2:27:27.
[116] VHR 45, 1/12/12, 2:27:27 – 3:08:33.
[117] VHR 45, 1/12/12, 3:08:05.
[118] VHR 45, 1/12/12. 3:06:29.
[119] VHR 45, 1/12/12, 2:45:05 – 2:49:10.
[120] VHR 46, 1/13/12, 10:26:03.

appear more dangerous than he was.[121] The court sustained the objection and admonished the jury to disregard it.[122] KRE 404(b) is a rule of general exclusion with only certain specific exceptions. *Sherroan v. Commonwealth*, 142 S. W. 3d 7 (Ky. 2004). Uncharged misconduct is presumed inadmissible unless the proponent passes each part of the three-part test in *Bell v. Commonwealth,* 875 S. W. 2d 882 (Ky. 1994) for relevance, probativeness, and prejudice. None of the three statements here passes the *Bell* test.

The court should have–at some point—granted a mistrial due to the repeated introduction of prejudicial 404(b) evidence that went far beyond evidence of mere incarceration in a case involving one man's word against another's. *Cf.*, *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007) (finding error harmless due to overwhelming evidence of guilt).The evidence was overwhelming here that *someone* was guilty, but it was not overwhelming that it was appellant. Given that the trial court allowed a landslide of other 404(b) evidence and refused to allow reverse 404(b) evidence against Reese, the three references here must be deemed prejudicial. The cumulative 404(b) evidence violated appellant's right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process.); *see also*, *United States v. Scheffer*, 523

[121] VHR 46, 1/13/12, 10:30:31 – 10:33:26.
[122] VHR 46, 1/13/12, 10:26:52 and 10:29:11- 10:33:26.

U.S. 303, 315 (1998); *Ege v. Yukins,* 485 F.3d 364, 377-78 (6th Cir. 2007) (failure to exclude unreliable evidence violates due process, citing *Chambers v. Mississippi,* 410 U.S. 284 (1973)).

8. The prosecutor improperly impeached appellant by repeatedly referring to his two LWOP sentences.

Preservation. This issue is preserved.[123]

Facts. Appellant testified at this retrial that he shot at Trooper Bennett's car to disable it so he could get away.[124] At the beginning of appellant's cross examination, the prosecutor asked for a bench conference to inform the judge he intended to impeach appellant with his prior testimony that appellant fired at Trooper Bennett because appellant had two LWOP sentences.[125] Defense counsel argued no inconsistency existed because appellant's current testimony was that he shot at the car to disable it so he could get away.[126] Counsel also argued that informing the jury of appellant's LWOP sentences unduly prejudiced him because of the severity of the sentence and type of crime for which it is given.[127] The judge allowed the prosecutor to impeach appellant with his prior testimony about LWOP sentences to show appellant's motive. The judge stated the jury was thinking appellant wanted to get away because he was

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[123] VHR 48, 1/18/12, 2:16:54-2:20:43; VHR 49, 1/18/12, 4:11:10-4:13:05.
[124] VHR 48, 1/18/12, 2:13:06; 2:14:31.
[125] VHR 48, 1/18/12, 2:16:54.
[126] VHR 48, 1/18/12, 2:17:26.
[127] VHR 48, 1/18/12, 2:18:44.

wanted for escape but his motive was because appellant had something serious hanging over his head and had nothing to lose.[128]

After the prosecutor's cross examination of appellant ended, defense counsel moved for a mistrial, noting the prosecutor referenced appellant's LWOP sentences eight times by their count.[129] The prosecutor responded that he only used it to show motive.[130] The judge hoped it was not error but denied the motion.[131]

Argument. Nothing inconsistent existed between appellant's prior testimony and his current testimony. KRE 801A; KRE 613. An inconsistent statement occurs "when the proffered statement and the witness' testimony lead to inconsistent conclusions." *Meece v. Commonwealth.*, 348 S.W.3d 627, 673 (Ky. 2011)(*cert. denied,* 133 S. Ct. 105 (2012))(quoting *Porter v. Commonwealth*, 892 S.W.2d 594, 596 (Ky. 1995) and *Commonwealth v. Jackson*, 281 S.W.2d 891, 896 (Ky. 1955)). The inconsistency in the witness' differing expressions must arise from incompatible beliefs. L. Abramson, 9 Ky. Prac. Crim. Prac. & Proc. § 27:190 (2011 -2012)(citing *Jackson, supra*). Thus, the meaning of an inconsistent statement focuses not on the exactness of language but on the correspondence of thought.

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[128] VHR 48, 1/18/12, 2:20:11-2:20:43.
[129] VHR 49, 1/18/12, 4:11:10.
[130] VHR 49, 1/18/12, 4:12:00.
[131] VHR 49, 1/18/12, 4:12:55.

Appellant's prior testimony and his current testimony contained no inconsistent conclusions based on incompatible beliefs. Quite to the contrary, both of appellant's testimonies were similar expressions based on the exact same belief. Appellant's current testimony was that he shot at the car so he could get away. Appellant's prior testimony was that he shot at the car so he would not go back to jail to serve his LWOP sentences. Appellant's belief was that he wanted to get way from Trooper Bennett so he would not go back to jail. No inconsistency exists between his current and prior testimony.

Reversible error occurred when the judge allowed the prosecutor to reference appellant's LWOP sentences. A defendant's prior testimony is subject to the evidence rules just as all other evidence is, and the trial court should redact irrelevant or unduly prejudicial portions. *Brown v. Commonwealth*, 313 S.W.3d 577, 606-609 (Ky. 2010). What little relevance attached to appellant's motive for shooting at the Trooper's car (to disable it so he could get away because he did not want to go back to jail) was substantially outweighed by the undue prejudice it imparted to him when the prosecutor revealed to the jury that appellant already had two LWOP sentences. KRE 401; KRE 403.

The prosecutor's use of this prior testimony unduly prejudiced appellant. As counsel argued, someone does not receive a LWOP sentence for stealing

stuff.[132] The law reserves such a sentence for the most heinous of crimes, as was explained to each juror during individual voir dire. The prosecutor repeated appellant's prior sentence at least seven times throughout the course of cross examination.[133] The judge erred when he allowed the prosecutor to reference the LWOP sentences. The prosecutor then exacerbated this error by his excessive references to the sentences during cross. Because of this repetition, one of the main points the jury took from the cross of appellant was that he already had two LWOP sentences. The emphasis the prosecutor placed on this knowledge prevented appellant from receiving a fair trial, and a mistrial should have been granted. *Graves v. Commonwealth*, 285 S.W.3d 734, 737 (Ky. 2009); *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). The admission of prejudicial LWOP evidence violated appellant's right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process.); *see also, United States v. Scheffer*, 523 U.S. 303, 315 (1998); *Ege v. Yukins,* 485 F.3d 364, 377-78 (6th Cir. 2007) (failure to exclude prejudicial evidence violates due process, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).Therefore, reversal is required with instructions that this practice not be repeated if another trial is held.

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[132] VHR 48, 1/18/12, 2:18:44.
[133] VHR 48, 1/18/12, 2:40:50; 3:12:04; 3:26:32; VHR 49, 1/18/12, 3:51:52; 3:56:18; 3:59:58; 4:03:44.

9. **Excluding relevant evidence of Reese's prior bad acts violated appellant's due process right to present a defense.**

Preservation. This issue is preserved as explained in the "Facts" section.

Facts. Defense counsel filed a Motion to Introduce "Reverse 404(b)" Evidence against Dennis Reese, which the parties discussed at length before jury selection began.[134] Counsel sought to introduce Reese's murder of Kathy Burns-Emerson to support the defense theory that Reese kidnapped and killed Brady because of the high degree of similarity between the two crimes. The judge refused to allow counsel to introduce this evidence in the guilt phase.[135]

In spite of this pretrial ruling, counsel still sought to introduce this evidence in good faith at least as impeachment evidence. Reese testified on cross that he never intentionally killed anyone. He added that a person is a murderer only if that person intends to kill someone.[136] Following this exchange, the judge denied counsel the opportunity to impeach Reese's disingenuous testimony by asking about his plea to the murder of Kathy Burns-Emerson.[137] A week later, the judge allowed counsel a very limited chance to impeach Reese on this point. But when counsel asked him if he said he hit

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[134] TR XXXVII, 5408-5413 (see Tab 11); VHR 43, 1/11/12, 8:44:00-9:57:59.
[135] VHR 43, 1/11/12, 9:37:24; 9:40:11; 9:55:05. Some details of the Kathy Burns-Emerson murder were provided to the jury during the penalty phase through the playing of the avowal testimony of Bob Wallace. VHR 50, 1/20/12, 1:06:47-1:18:51.
[136] VHR 43, 1/11/12, 3:14:50.
[137] VHR 43, 1/11/12, 3:15:27-3:18:03.

Burns so many times he lost count, Reese denied making the statement.[138] The judge denied counsel the opportunity to remedy this misstatement, ruling the affidavit that contained this statement inadmissible as extrinsic evidence.[139] On redirect a few moments later, Reese stated he never would have said that, that he only hit her one time, that the medical examiner proved it, and that he could count to one. When counsel asked Reese if Reese bludgeoned Burns' head into pieces, Reese replied that it did not happen like that and accused counsel of "stretching the truth."[140] Counsel then asked "they [the jury] will decide what the truth is, won't they?" to which Reese responded "they sure will."[141] However, the judge's rulings prevented the jury from accurately judging Reese's credibility.

Argument. The judge arbitrarily and disproportionately applied the rules of evidence in a way that denied appellant the ability to demonstrate to the jury that Reese rather than appellant kidnapped and murdered Brady. This court has consistently held "that a defendant 'has the right to introduce evidence that another person committed the offense with which he is charged.'" *McPherson v. Commonwealth*, 360 S.W.3d 207, 214 (Ky. 2012)(quoting *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003) and *Eldred v. Commonwealth,* 906 S.W.2d 694,

[138] VHR 48, 1/18/12, 1:42:14.
[139] VHR 48, 1/18/12, 1:42:39.
[140] VHR 48, 1/18/12, 1:51:55.
[141] VHR 48, 1/18/12, 1:52:20.

705 (Ky. 1994)). Both due process and the right to present a defense provide the Constitutional foundation for this rule. *Beaty*, 125 S.W.3d at 206-207; *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); 5th, 6th, and 14th Amendments, U.S. Constitution.

"An exclusion of evidence will almost invariably be declared unconstitutional when it 'significantly undermine[s] fundamental elements of the defendant's defense.'" *Beaty*, 125 S.W.3d at 206-207(*quoting United States v. Scheffer*, 523 U.S. 303, 315 (1998)). However, the accused's right to prove to the jury that someone else committed the crime does not abrogate the rules of evidence. Instead, "the Supreme Court has held, the defendant's interest in the challenged evidence must be weighed against the interest the evidentiary rule is meant to serve, and only if application of the rule would be arbitrary in the particular case or disproportionate to the state's legitimate interest must the rule bow to the defendant's right." *McPherson*, 360 S.W.3d at 214(citing *Montgomery v. Commonwealth,* 320 S.W.3d 28, 41 (Ky. 2010), *Holmes v. South Carolina,* 547 U.S. 319 (2006), and *Scheffer,* 523 U.S. 303).

This court has decided three reverse 404(b) cases over the last decade that when considered together and applied to appellant's case demonstrate the harmful error that occurred at trial. These three cases emphasize three core concepts—credibility, similarity, and relevancy—that require reversal.

First, the exclusion of the Burns murder prevented the jury from possessing enough information to accurately judge Reese's credibility. In *Beaty*, the defendant's conviction of controlled substance offenses was reversed because he was not allowed to present evidence that another person planted drugs in the car he was driving. *Beaty*, 125 S.W.3d at 208-210. When a defendant offers evidence suggesting that another person committed the charged crime, the judge may exclude that evidence only when "the defense theory is 'unsupported, speculat[ive], and far-fetched' and could thereby confuse or mislead the jury." *Id.* at 207. If the alternative perpetrator had the motive and opportunity to commit the crime, the evidence should be admitted. *Id.* at 208. The jury bears the responsibility to weigh, evaluate, and decide the credibility of the accused's theory: "[n]o matter how credible [the alleged alternative perpetrator] defense, our system of justice guarantees the right to present it and be judged by it." *Id.* at 210. Receiving this kind of information, then, is essential for a jury to effectively judge the credibility of the accused and the alternative perpetrator theory.

Second, reverse 404(b) evidence allows a jury to judge the credibility of the accused's alternative perpetrator theory when that evidence is similar to the charged offense. In *McPherson*, 360 S.W.3d 207, McPherson was charged with murdering an acquaintance in exchange for money and drugs. McPherson sought to impeach a witness, Parker, by introducing that years before in a

separate case Parker had threatened to kill an accusing witness. This court upheld the exclusion of this impeachment because it had almost no similarity to the murder McPherson was accused of committing. This dissimilarity did not support an inference that the same person committed both acts. *Id.* at 212-215. While dissimilarity supports exclusion, the corollary is that similarity of the offenses warrants admission of the reverse 404(b) evidence.

Third, relevant reverse 404(b) evidence should be admitted. In *Blair*, Blair had been convicted of murdering his victim during the course of robbing her. This court held he should have been allowed to present evidence that the police officer who investigated the murder had previously been involved in the theft of property from the police evidence room. *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004). This court determined the lower admissibility standard of KRE 401 should apply, and it should be excluded only when KRE 403 is met: "a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor." *Id.*(quotation omitted).When reverse 404(b) evidence is relevant, it must be admitted unless its probative value is substantially outweighed by the concerns of KRE 403.

The proffered reverse 404(b) evidence of Reese's murder of Kathy Burns-Emerson was relevant to appellant's theory of the case that Reese kidnapped and murdered Brady because the similarity of the events would have presented a different picture of Reese's credibility to the jury. Reese admitted to

being present at the kidnapping and murder of Brady, though he claimed appellant committed the offenses. Appellant admitted to being present when Reese met Brady and let them leave without warning Brady, though he claimed Reese killed Brady. The jury was left to decide between the two; the jury had to judge their credibility. But the jury was not allowed to hear relevant evidence that would have affected their evaluation of Reese and his credibility. Instead, the jury was left with Reese's untruthful denial of the striking similarities between the Kathy Burns-Emerson murder and the Brady murder.[142]

The jury heard Reese blame appellant for kidnapping and murdering Keeling, and the jury heard Reese say appellant acted almost identically towards Brady, saying and doing the same things. The jury never heard in a meaningful way how Reese beat a woman to death by hitting her in the head with a board, how Reese dumped her body in a rural area, and how Reese stole her red pickup truck.[143] Yet this follows a very similar pattern to the murder of Brady

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[142] VHR 43, 1/11/12, 3:14:50-3:18:03; VHR 48, 1/18/12, 1:42:14; 1:51:55.

[143] From "Notice of Intent to Offer Evidence in Support of Bill of Particulars": "Ken Henson and Tony Willis, Investigators for the Office of District Attorney, and B.J. Moore, Sheriff of Bryan County, will testify that Dennis Reese admitted beating Kathy Burns with a board, then dragging her semi-nude body to an area near the attack and leaving her to languish and die from these injuries." TR XXXVII, 5434-5435. Pleading signed by Theresa McGehee, District Attorney.

From Affidavit of B.J. Moore, "I arrested Dennis Reese for Grand Larceny. At the Bryan County Sheriff's Office Dennis Reese stated that he had taken Kathy Burns to an isolated area in Mead, OK Bryan County during the early morning of June 5, 1991. Reese stated that at that location he had choked Burns and then hit her several times with a board ("I don't know how many times I hit her, I lost count")." TR XXXVII, 5439.

and Keeling. Both Brady and Keeling died from head injuries. Both bodies were placed in a rural area. The trucks of both were stolen. This degree of similarity exceeds that of *McPherson*, and even *Blair*. It was relevant because it supported appellant's defense that Reese kidnapped and killed Brady. Reversible error occurred when the judge excluded it.

Though significant similarities existed between Reese's murder and robbery of Kathy Burns-Emerson and the kidnapping, murder and robbery of Brady, the judge arbitrarily and disproportionately applied rules of evidence to exclude this otherwise relevant evidence. Its exclusion violated his constitutional rights. *McPherson*, 360 S.W.3d 207; *Beaty*, 125 S.W.3d 196; *Chambers*, 410 U.S. 284; *Crane*, 476 U.S. 683; *Scheffer*, 523 U.S. 303; 5th, 6th, and 14th Amendments, U.S. Constitution. Therefore, the due process right to present a defense requires that appellant be granted a new trial where he can present complete reverse 404(b) evidence of Reese's murder of Kathy Burns-Emerson to the jury.

From Affidavit for search warrant by Bob Wallace: "a subject named Dennis Gene Reese stated to Sheriff B.J. Moore and myself that he had went to an isolated area of Mead Oklahoma in Bryan County with Kathy Burns-Emerson and that at that location had hit Kathy Burns-Emerson over the head "SO MANY TIME I LOST COUNT" and then concealed her body. . . . I observed that Kathy Burns-Emerson had massive head injuries." TR XXXVII, 5465.

10. Victim impact evidence from Keeling's widow violated appellant's 14th Amendment due process right to fundamental fairness.

Preservation. This issue is preserved. Appellant filed a motion objecting to the "Commonwealth's proposed evidence relating to Tim Keeling" and a new trial motion that objected to allowing the full evidence of Tim Keeling's murder.[144] The judge denied these motions.[145]

Facts. The following evidence was introduced at the guilt phase of appellant's trial. Lisa Marie Hill married Timothy Keeling on September 30, 1989, just before she turned 20 years old and he turned 21.[146] While Tim made money working as a paramedic, he found his calling volunteering as a youth pastor at a church plant in inner city Denver. Tim and Lisa, who helped Tim with his ministry, spent a great deal of time at the 16th Street Mall working with street kids and runaways who had no home.[147]

Lisa testified she last saw her husband on September 26, 1991. Lisa left their duplex to attend a church function, and Tim had planned to go to the grocery store to have food for the street kids that Tim would bring home to stay with them. Lisa never saw Tim again.[148] Lisa learned six days later that Tim would never come home again when homicide detectives told her what

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[144] TR XXXV, 5145; TR XXXIX, 5690-5691. See Tab 10.
[145] TR XXXV, 5217-5222; TR XXXIX, 5703. See Tab 10.
[146] VHR 44, 1/12/12, 11:06:30.
[147] VHR 44, 1/12/12, 11:07:03.
[148] VHR 44, 1/12/12, 11:11:35-11:13:00.

happened and gave Tim's high school class ring back to her.[149]

Tim owned a Toyota four-by-four with a custom paint job, which he bought at a vehicle auction.[150] She last saw that truck the same day she last saw Tim.[151] Tim had been trying to sell the truck, even putting a little for sale sign in the window. He bought it at an auction for that purpose, to make some extra money:[152]

> Prosecutor: Was there some goal in mind to make some profit?
>
> Lisa: Everything we did was in efforts to work with the Ministry there, and we were about, we had just looked a house in downtown Denver that we had planned to use for the street kids to be able to come in and get back on their feet and learn some skills and get off the streets, and so everything we did was for that purpose.
>
> Prosecutor: Was there something ultimately beyond just the purpose of getting them off the street?
>
> Lisa: Ultimately it was a relationship with God. That's what, Tim and I met in Bible College, and our whole purpose in life, everything that we talked about, our dreams were for that. That kids who had been in difficult circumstances could really experience a different type of relationship with God than maybe what they had seen, and that they would see that through our lives.[153]

Argument. KRS 532.055(2) (a) (7) allows the prosecution to introduce evidence at the sentencing hearing of the "impact of the crime upon the victim

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[149] VHR 44, 1/12/12, 11:15:20-11:16:31.
[150] VHR 44, 1/12/12, 11:08:16.
[151] VHR 44, 1/12/12, 11:11:11.
[152] VHR 44, 1/12/12, 11:16:54.
[153] VHR 44, 1/12/12, 11:17:08-11:18:14.

or victims, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims." KRS 421.500(1) (b) includes, among other relationships, the spouse of the deceased. Lisa Hill did not qualify as a victim under the statute since appellant had not been convicted of murdering Tim Keeling. Reversible error occurred when the prosecution solicited this victim impact evidence during the guilt phase.

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the United States Supreme court held that no *per se* Eighth Amendment bar exists to the admission of victim impact evidence during the penalty phase of a capital trial. The testimony in *Payne* involved a relative informing the jury during the sentencing phase of Payne's death penalty trial of the effects the victims' deaths had on the family. The court upheld admission of this evidence, stating the prosecution "may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at 827.

However, the court in *Payne* did not create a rule that allowed the automatic introduction of any and all victim impact evidence: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial

fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825 (citing *Darden v. Wainwright,* 477 U.S. 168, 179–183 (1986)). *Payne* provides no authority for introduction of victim impact evidence during the guilt phase. Moreover, while this exclusionary mechanism may exist, the court has never explained how to use it. Justice Stevens, who dissented in *Payne,* observed over two decades later that this "statement represents the beginning and end of the guidance we have given to lower courts considering the admissibility of victim impact evidence in the first instance." *Kelly v. California,* 129 S. Ct. 564, 566 (2008) (in dissent from denial of cert. petition).

This observation tests true. Little meaningful guidance exists regarding the scope of what victim impact evidence is constitutionally permissible. The Sixth Circuit, interpreting *Payne*, states the test this way: "The standard for such due process challenges is whether the evidence or argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Roe v. Baker,* 316 F.3d 557, 565 (6th Cir. 2002) (quoting *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (concerning admission of evidence)); *see also Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) (concerning prosecutorial misconduct). This reflects foundational law regarding the Fourteenth Amendment Due Process Clause. "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due

process of law.'" *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968). Also "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The murder of Tim Keeling infected appellant's trial for the kidnapping of Brank Brady with unfairness.

Admission of Lisa Hill's victim impact testimony about her deceased husband deprived appellant of a fundamentally fair trial for the kidnapping of Frank Brady. Lisa's testimony about Tim's work as a paramedic, service as a youth pastor, care for inner-city kids, and faith in Christ likely would be admissible under *Payne* in the sentencing phase of a trial for the murder of Tim Keeling. Indeed, this court has stated that the "victim of a homicide 'can be identified as more than a naked statistic' and the defendant is not unduly prejudiced by the identification of the victim as a human being." *Gray v. Commonwealth*, 203 S.W.3d 679, 689 (Ky. 2006). While limited victim background evidence may be admissible, admission of victim impact evidence during the guilt phase constitutes reversible error:

> we have held that the introduction of victim impact evidence during the guilt phase is reversible error. *Ice v. Commonwealth,* 667 S.W.2d 671, 676 (Ky. 1984). Victim impact evidence differs from victim background evidence, in that the former is "generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence." *Bennett v. Commonwealth,* 978 S.W.2d 322, 325–26 (Ky. 1998).

Ernst v. Commonwealth, 160 S.W.3d 744, 763 (Ky. 2005).

Reversible error occurred when this testimony about Tim Keeling was introduced in the trial of Frank Brady's kidnapping. No language in *Payne* –**or in any other case**—authorizes, or even contemplates, the introduction of victim impact evidence of a person not the subject of the indictment being tried. Rather, "[s]tates must ensure that 'capital sentencing decisions rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the ***particular*** offense' are considered." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987)) (emphasis added).

The kidnapping of Tim Keeling in Denver and his murder in New Mexico were not the particular offenses of the indictment against appellant for the kidnapping of Frank Brady in Hardin County, Kentucky. The Commonwealth did not try appellant in Hardin County for the murder of Tim Keeling. The police did not arrest appellant for the murder of Tim Keeling. The Grand Jury did not indict appellant for the murder of Tim Keeling. The jury did not return a verdict of guilty against appellant for the murder of Tim Keeling as required by KRS 532.055(2), which operates as the prerequisite for the introduction of this type of testimony. Its introduction requires reversal.

Introduction of Lisa's testimony invited the risk that the jury found appellant guilty because Tim Keeling was a Christian who cared for under-

privileged kids in Denver even though appellant had not been indicted, tried, or convicted of murdering Tim Keeling—and could not be within the jurisdiction of Kentucky. Even if that was merely a portion of the jury's motivation, such a result violates fundamental fairness.

What happened to Keeling was a tragedy. No other word can describe the kidnapping and execution of a young man who practiced his faith by dedicating his life to working with inner-city young people. Given the emotional nature and rhetorical power of this evidence, the quality and character of Tim Keeling infected the entire trial. *Roe*, 316 F.3d at 565. The jury could not have isolated and ignored such emotional evidence because this victim impact evidence did not result from the particular offense for which appellant faced the death penalty. KRS 532.055(2); *Romano*, 512 U.S. at 7. Admission of it unduly prejudiced appellant's due process right to fundamental fairness in his Hardin County trial. *Payne*, 501 U.S. at 825. Therefore, this court should remand his case and order this evidence to be excluded if any further proceedings are held.

11. The Commonwealth improperly asked appellant to call other witnesses liars in violation of *Moss* and due process.

Preservation. This issue is unpreserved.

Facts and Argument. The Commonwealth asked appellant to characterize numerous witnesses as liars. First, appellant was forced to

characterize OSBI Agent Perry Unruh as lying about appellant's weight gain.[154] Appellant was also forced to characterize Trooper Bennett's and Martin Comly's identification of him in Kentucky as being wrong.[155] Finally, appellant was forced to characterize Bylynn as lying about bringing handcuffs to him after his jail escape.[156]

This court has cautioned against asking a witness to comment on the truth of another witness. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997); *see also Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928) (reversing the appellant's conviction due to improper cross-examination of the appellant).

In *Moss*, the prosecutor badgered the defendant into stating a testifying police officer was lying during cross-examination. 949 S.W.2d at 583. The Kentucky Supreme Court stated that "a witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying." *Id.* at 583. The court warned that this type of question "places the witness in such an unflattering light as to potentially undermine his entire testimony." *Id.* Further, a prosecutor should not resort to blunt force to show the jury where the testimonies of the witnesses differ. *Id.* Whether a

[154] VHR 48: 1/18/12; 11:15:27.
[155] VHR 48: 1/18/12; 11:15:55.
[156] VHR 48: 1/18/12; 11:15:01.

witness is lying is a decision "within the exclusive province of the jury." *Id.*, (quoting *State v. James*, 557 A.2d 471, 472 (R.I. 1989)).

When a *Moss* violation is properly preserved, appellate courts review for harmless error. RCr 9.24. The test for harmless error is "whether on the whole case there is a substantial possibility that the result would have been any different." *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). An error is also harmless if the "judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

In this case, but for the Commonwealth's misconduct, there is a substantial possibility that appellant could have been acquitted of at least the capital kidnapping charge or given a sentence less than death. First, the case turned on the credibility of Reese and appellant, each claiming the other kidnapped then killed Brady. There was nothing else that connected appellant to Brady's kidnapping but Reese's testimony. Whether the jury believed Reese or appellant was determinative. Second, the trial judge exacerbated the problem by preventing the defense from impeaching Reese about hitting Kathy Burns over the head "so many times [he] lost count" and stealing her truck to elude police. *See* Right to present defense issue #9, *supra.* The inability to impeach Reese with admissible evidence bolstered Reese's testimony; just as forcing

appellant to characterize a police officer, his own wife, and other witnesses as liars diminished appellant's own testimony.

The Commonwealth's *Moss*-type questions to appellant constituted prosecutorial misconduct that probably affected the outcome. *Burger v. United States*, 295 U.S. 78, 89 (1935) (a new trial granted when prejudice is probable where evidence of guilt based mostly on testimony of "an accomplice with a long criminal record" is not "overwhelming" to overcome prosecutor misconduct). Appellant was convicted and received the maximum sentence of death. This court has found reversible error in a case where "the maximum sentence has been imposed by the verdict, and it would be pure speculation for us to ponder what, if any, portion of the punishment stemmed from the improper argument of counsel." *Blane v. Commonwealth*, 364 S.W.3d 140, 153 (Ky. 2012) (quoting *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969) (reversing and granting defendant new trial after the prosecutor made improper comments during closing arguments)). This court presumed prejudicial palpable error when the jury recommended the maximum sentence. *Id.* at 152. Similarly, by asking St. Clair numerous impermissible *Moss*-type questions, the Commonwealth ignored and flouted this court's holding in *Bullitt I* that although not rising to the level of reversible error, the "Commonwealth's cross-examination of Appellant included some questioning that was impermissible under *Moss*." 140 S.W.3d at 554. The Commonwealth's actions resulted in a

conviction and a maximum sentence of death. Accordingly, prejudice can be presumed.

Further, introduction of this improper evidence was so fundamentally unfair that it violated 5th and 14th Amendment due process. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Green v. Georgia*, 442 U.S. 95, 97 (1979); *cf.*, *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (unreliable prejudicial bite mark evidence violated due process, and should have been excluded). Allowing the *Moss* evidence to support this death sentence is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (*citing, Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). The trial court erred to appellant's substantial prejudice and denied him due process of law by encouraging the blatant *Moss* violations. §§ 2, 7, & 11, Ky. Const.; 5th, 6th & 14th Amends., U.S. Const. A new trial is required.

12. Reversal is required due to violation of law of the case in *Hardin I* regarding marital communications.

Preservation. This issue is unpreserved. Four statements were identified in *Hardin I* that appeared to be either definite or possible confidential

marital communications. One of those statements, which this court designated as "statement one" by Bylynn, occurred when she met St. Clair in Texas right after his escape. "Statement one" included both a verbal and a non-verbal portion. This issue deals only with the non-verbal portion of the communication, i.e., that she hugged St. Clair and felt a gun on his belt. This court noted that while both the verbal and non-verbal portions of statement one took place at a fair and apparently occurred in full view of the public eye, it was unclear whether Reese, who was also there at the fair, somewhere, was in a position where he was able to perceive this communication. On remand, at the urging of defense counsel, the trial court threw out a fifth statement not addressed in *Hardin I*, consisting of appellant's private phone conversation telling Bylynn what to bring him in Texas.[157] But the defense failed to object when prosecutor Dana Todd read to the jury from Bylynn's prior 2001 Hardin County testimony that **"Michael had a gun. I didn't see one, but when I hugged him I felt something hard on his belt line, but I never seen it."**[158]

Argument. When a privilege has been violated, balancing under KRE 403 is not necessary, and reversal is appropriate on a simple finding of prejudice. *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005) (as noted in the dissent). The fact this evidence was prejudicial is the law of this case. This court

[157] VHR 47, 1/17/12, 9:16:36.
[158] VHR 11, 12/19/11, 3:40:32 ; VHR 47, 1/17/12, 2:23:25.

held in *Hardin I* that all of appellant's marital communications to Bylynn were prejudicial because the Commonwealth used them to corroborate St. Clair was the shooter. *Id.* It is also the law of the case that Bylynn was a critical witness because her testimony confirmed St. Clair still had the weapon in Dallas. *Hardin I*, 174 S.W.3d at 477-78. Allowing appellant's nonverbal communication to Bylynn in Texas that he was carrying Vernon Stevens' gun despite the clear directive of *Hardin I* that additional findings were required on this requires reversal.[159]

Who had Vernon Stevens' gun –and when—was an important issue for the defense. Appellant admitted he came to Kentucky with Reese, and admitted he shot at Trooper Bennett's cruiser. But it was his defense that Reese took the gun to New Mexico while appellant stayed in Texas, and that Reese had the gun in Kentucky except when appellant grabbed it from where Reese had left it sitting in the truck between them and then used it to disable Trooper Bennett's cruiser.[160] Appellant said he gave the gun back to Reese before the two parted ways permanently in Kentucky.[161] The re-introduction of the nonverbal part of statement one was highly prejudicial because it supported Reese's contention that appellant –and not Reese—had the gun all along. Proving appellant always

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[159] VHR 47, 1/17/12, 2:22:10 – 2:24:15.
[160] VHR 48, 1/18/12, 2:13:44.
[161] VHR 48, 1/18/12, 2:15:00.

had the gun was important to the Commonwealth's theory that appellant was the ringleader and shooter.

In 1991, KRS 421.210(1) provided that confidential communications between husband and wife were **absolutely privileged** regardless of whether or not the information had been or was intended for disclosure:

> (1) In all actions between husband and wife, or between either or both of them and another, either or both of them may testify as other witnesses, except as to confidential communications between them during marriage.... and provided further, that neither may be compelled to testify for or against the other.

KRS 421.210, 1990 Kentucky Laws H.B. 214 (Ch. 88). Under KRE 107(b) the rule that applies is still KRS 521.210, a rule "designed to protect and enhance the marital relationship at the expense of otherwise useful evidence." *Hardin I,* 174 S.W.3d at 478 -479; *Terry v. Commonwealth*, 153 S.W.3d 794, 801-02 (Ky. 2005). Under KRS 521.210 in effect in 1991, appellant could prevent Bylynn from divulging a confidential marital communication regardless whether it was intended for disclosure to any other person at the time it was made.

For over 120 years --since 1890-- the marital privilege has consistently and repeatedly been interpreted in Kentucky as protecting not only verbal but also nonverbal communications between husband and wife. The 1997 case of *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997) cites cases consistently upholding the rule, including cases from 1948, 1956, 1957, and 1987 as well as the seminal case from 1890:

> The word "communication" ... should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. *Commonwealth v. Sapp*, 90 Ky. 580, 14 S.W. 834, 835 (1890).

Slaven, 962 S.W.2d at 851; see also, *State v. Holmes*, 330 N.C. 826, 828-829, 412 S.E.2d 660, 661 - 662 (N.C.1992); see also cases collected by George L. Blum, J.D., *"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse,"* 23 A.L.R.6th 1. Gun behavior has been held a private, privileged marital communication. *State v. Holmes*, 330 N.C. 826, 412 S.E.2d 660 (N.C. 1992)(taking gun out of kitchen cabinet); *People v. Sullivan*, 42 Misc. 2d 1014, 249 N.Y.S.2d 589 (N.Y. 1964) (wife found gun in her husband's pocket while he was asleep).

The confidence and sanctity of the marital relationship is "the best solace of human existence." *Trammel v. United States*, 445 U.S. 40, 51 (1980), (*citing Blau v. United States*, 340 U.S. 332 (1951)). Bylynn's testimony regarding a privileged nonverbal communication violated the marital privilege and deprived appellant of due process under the 5th and 14th Amendments of the United States Constitution. No other privilege sweeps so broadly. *Trammel, supra*; see also *Mack v. Commonwealth*, 860

S.W.2d 275, 277 (Ky. 1993) (rules of evidence form basic framework of due process). Retrial is required.

13. A new trial is required because an impermissibly suggestive identification violated appellant's right to due process.

Preservation. This issue is not preserved.[162]

Facts. Martin Comly went to the food mart at the truck plaza just off of I-65 Exit 105 in Lebanon Junction to return a couple of VHS tapes he had rented.[163] About 10 to 15 feet from the door, Comly bumped into a guy fairly hard.[164] The man acted "defensive" or "aggressive" and "like he didn't want to be looked at."[165] That man had a tattoo of a butterfly on the inside of his right arm.[166] This man walked back to his truck, a Toyota four-wheel-drive with a distinctive decal.[167] Another guy, a bigger fellow that was heavyset, stood in front of the truck and looked at Comly.[168] Comly saw these guys on TV the next day and went to the State Police Post to tell them they had been at the

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[162] This issue has not been raised in a previous Hardin County appeal.
[163] VHR 45, 1/12/12, 1:35:00; 1:36:04.
[164] VHR 45, 1/12/12, 1:35:18.
[165] VHR 45, 1/12/12, 1:34:57; 1:40:11; 1:43:07.
[166] VHR 45, 1/12/12, 1:35:37.
[167] VHR 45, 1/12/12, 1:38:06; 1:37:28.
[168] VHR 45, 1/12/12, 1:37:01.

food mart.[169] He picked them out of the photo packet.[170] Comly had been in court before and was able to identify the man.[171]

Argument. That suggestive identifications deprive defendants of due process is well established. The U.S. Supreme Court recognizes that an identification procedure might be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to result in a denial of due process of law. *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (*overruled on other grounds in Griffith v. Kentucky*, 479 U.S. 314 (1987)); *see also, Simmons v. U.S.*, 390 U.S. 377, 384 (1968). In *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the Supreme Court stated "[i]t is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification." If unnecessarily suggestive circumstances were not used to obtain the identification, then "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification." *Perry v. New Hampshire*, 132 S.Ct. 716, 730 (2012).

An unreliable identification based on a suggestive confrontation hinders justice. "A major factor contributing to the high incidence of miscarriage of

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[169] VHR 45, 1/12/12, 1:41:00.
[170] VHR 45, 1/12/12, 1:41:40.
[171] VHR 45, 1/12/12, 1:42:04.

justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). In *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977), the Supreme Court emphasized the concept of reliability to protect against this risk: "reliability is the linchpin in determining the admissibility of identification testimony." This court recognized these principles in *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985). The Supreme Court has adopted a two-step analysis for determining the admissibility of identification evidence.

First, the defendant must prove the identification procedure was impermissibly suggestive. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. The police should not in any manner or method suggest to the witness who the police have targeted as the suspect. To illustrate, "a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime." *United States v. Brownlee*, 454 F.3d 131, 138 (3rd Cir. 2006). Also, "there is no question that the display . . . of a single mug shot of each [defendant] unaccompanied by any other pictures, was unnecessarily suggestive." *Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978). In appellant's case, the police showed Comly two pictures, presumably one of appellant and one of Dennis Reese. The pictures were likely

their mug shots from Oklahoma.[172] Such an identification was unnecessarily suggestive.

Second, the court must determine whether, under the totality of the circumstances, the testimony was nevertheless reliable. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. The *Biggers* test was incorporated into the factors this court set out in *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995), to determine the suggestiveness of an identification. The factors are as follows: 1) opportunity to view, 2) witness' degree of attention, 3) accuracy of prior descriptions, 4) level of certainty at confrontation, and 5) time between the crime and the confrontation.

Comly's testimony lacked reliability. A review of the five *Biggers* factors establishes this. First, Comly had a limited opportunity to view appellant. While Comly bumped into the first man, Comly never observed the man by the truck at that close range. Second, the man he bumped into clearly caught Comly's attention. This rendered the man by the truck an afterthought. Third, all of Comly's pretrial identifications depended on the police. Comly saw the pictures in the police report a whole day after the encounter. He identified the two pictures the police showed him the day after that, likely from the same pictures he saw on TV the day before. That the prior descriptions were similar should

[172] The only potentially relevant photo of appellant in the record is a mug shot. See Court Exhibit file.

not be surprising. Fourth, while Comly's testimony indicated he identified appellant before the police station, his certainty proves to be unconvincing. He never had the opportunity to express anything besides certainty because of seeing the same pictures. Fifth, Comly's identification was not immediate. Rather, the identifications were made over the next couple of days, and they resulted from police suggestion. Any television and/or newspaper report indicated the police were looking for the men in the pictures. Comly then identified the men in the pictures. This analysis of the *Biggers* factors establishes that the impermissibly suggestive identification was also unreliable.

The police impermissibly suggested Comly's identification of appellant. The totality of the circumstances rendered the identification unreliable. Thus, introduction of Comly's identification of appellant violated his right to Due Process under the 14th Amendment. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. Therefore, this court should reverse appellant's conviction and order suppression of Comly's identification.

14. The evidence supported a jury instruction on facilitation to kidnapping.

Preservation. This issue is preserved. Appellant requested a facilitation to kidnapping instruction which the judge refused to give.[173]

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[173] VHR 49, 1/19/12, 8:55:05; 9:15:30-9:27:07.

Facts. After the judge decided to instruct the jury on facilitation to arson,[174] the parties engaged in a lengthy discussion about whether to instruct the jury on facilitation to kidnapping focused on whether the testimony of Reese and appellant established facts that supported this theory. The judge believed their testimony was mutually exclusive so that it was an all or nothing situation.[175] Defense counsel responded by alerting the judge to the language of the kidnapping instructions that included accomplice liability, which was just as inconsistent with their mutually exclusive testimony, and argued that the jury would likely find somewhere in the middle of their testimony.[176]

Specifically, counsel argued, the jury could believe that Reese and appellant were sitting in the truck, that Reese tapped the brakes twice and said "I've got a live one," and that appellant knew there was going to be an abduction because he saw it happening.[177] Further, counsel argued, the jury could believe that appellant's presence in the truck at the rest stop, which he admitted, immediately prior to the abduction and taking over the truck for Reese would allow the jury to find facilitation.[178] The judge denied instructing

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[174] VHR 49, 1/19/12, 9:04:27; 8:55:05-9:15:30.
[175] VHR 49, 1/19/12, 8:55:05; 9:16:30; 9:18:56; 9:19:44; 9:21:13; 9:26:30.
[176] VHR 49, 1/19/12, 9:16:57-9:18:02; 9:19:08-9:20:30; 9:23:29-9:24:40. The kidnapping instruction included "he, alone or in complicity with another," and the definitions included "complicity." TR XXXVIII, 5600; 5601.
[177] VHR 49, 1/19/12, 9:21:38.
[178] VHR 49, 1/19/12, 9:24:10.

the jury on facilitation to kidnapping, while the jury found appellant guilty of facilitation to arson.[179]

Argument. The evidence supported instructing the jury on the lesser included offense of facilitation to kidnapping. The value of lesser included instructions for defendants is universally recognized. The United States Supreme Court noted 40 years ago, "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). Lesser included instructions offer substantial protections for the accused: "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

The Commonwealth of Kentucky has long followed the principles annunciated in *Keeble* and *Beck*. The trial court has a duty to instruct the jury on the whole law of the case. *Holland v. Commonwealth*, 114 S.W.3d 792, 802 (Ky. 2003); RCr. 9.54(1); *Allen v. Commonwealth*, 245 Ky. 660, 54 S.W.2d 44, 45 (Ky. 1932)("Under the evidence, the jury could have come to one of several conclusions, which, being true, the court should have submitted the law as to

[179] TR XXXVIII, 5607.

such conclusions, it being the court's duty to instruct on the whole law of the case."). A defendant is entitled to a lesser included instruction if the jury could have a reasonable doubt as to the willfulness required by the greater offense, but reasonably find that he is guilty of the lesser offense. *Jenkins v. Commonwealth*, 275 S.W.3d 226, 230 (Ky. App. 2008); *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995). "[I]t is always the duty of a trial court to instruct a jury on lesser included offenses when it is so requested and it is justified by the evidence." *Martin v. Commonwealth*, 571 S.W.2d 613, 615 (Ky. 1978); *Miller v. Commonwealth*, 283 S.W.3d 690, 699 (Ky. 2009).

This court has long recognized that facilitation is a lesser included offense of complicity. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995). A person is guilty of criminal facilitation when "acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." KRS 506.080. The primary difference between facilitation and complicity is the presence of intent:

> [u]nder either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent.

Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001)(*accord.*, *Luttrell v. Commonwealth*, 554 S.W.2d 75, 79 (Ky. 1977)).

The absence of intent to commit the crime indicates facilitation. In other words, facilitation "reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995). This court recently restated this principle that a complicitor intends the commission of the crime while the facilitator lacks the intent for the commission of the crime: "Perhaps a clearer statement is that a complicitor must be an instigator, or otherwise invested in the crime, while a facilitator need only be a knowing, cooperative bystander with no stake in the crime." *Monroe v. Commonwealth*, 244 S.W.3d 69, 75 (Ky. 2008). Intent to commit the crime indicates complicity; knowledge the crime is being committed indicates facilitation. *Young v. Commonwealth*, 50 S.W.3d 148, 165 (Ky. 2001).

Reversal is appropriate when a facilitation instruction is not given even though the evidence warrants it. In *Webb*, this court found error occurred when a facilitation instruction was not given. Even though Webb testified that he gave his girlfriend a ride in his car knowing that she was in the process of a drug transaction, he had no intention for her to commit the crime. *Webb*, 904 S.W.2d at 229. Appellant's case resembles *Webb*.

The jury could have reasonably concluded—just as they did when they convicted appellant of facilitation to arson—that appellant lacked the intent to

kidnap Brady but knew Reese was going to do it and provided him the opportunity to do so. Appellant sat in the truck with Reese. He knew Reese was looking for someone to rob. He heard Reese say, "I have a live one." He took over driving Keeling's truck so Reese could go with Brady in Brady's truck. This supports a finding that appellant knew Reese was going to hold Brady against his will and helped him do so by driving the other truck.

The judge erred when he refused to instruct the jury on facilitation to kidnapping because of the mutually exclusive testimony. As counsel argued, the judge instructed the jury on complicity because the jury could believe part of Reese's testimony while disbelieving other parts and could believe part of appellant's testimony while disbelieving other parts which could lead to the finding that they both intended to kidnap Brady. This court recently approved of this analysis in *Hall v. Commonwealth*, 337 S.W.3d 595, 610-611 (Ky. 2011). A jury can disbelieve portions of a witness' testimony and infer knowledge from the defendant's conduct. *Id.* (citing, *Chumbler*, 905 S.W.2d at 498-499; *Robinson v. Commonwealth,* 325 S.W.3d 368, 371 (Ky. 2010)). Likewise, in appellant's case, the jury could have believed certain portions of both Reese's and appellant's testimony and inferred from the appellant's conduct to find facilitation.

Reversible error occurred when the judge failed to provide the requested facilitation instruction. A jury could have reasonably acquitted appellant of kidnapping and found him guilty of facilitation to kidnapping—like they did

with the judge's instruction on facilitation to arson. Reversal is required because "failure to give a necessary lesser included offense instruction cannot be deemed a harmless error." *Commonwealth v. Swift*, 237 S.W.3d 193, 196 (Ky. 2007)(citing, *Webb*, 904 S.W.2d at 229)). Appellant requests that his conviction be vacated and his case remanded so that the jury can be properly instructed on these lesser offenses if another trial is held.

PENALTY PHASE ISSUES

15. Improper, excessively detailed evidence regarding prior convictions violated *Mullikan*, *Blane*, and due process.

Preservation. This issue is unpreserved.

Facts and Argument. In the penalty phase, the Commonwealth introduced evidence of appellant's involvement in Ronnie St. Clair's and William Kelsey Jr.'s murders. The Commonwealth also introduced details of Ed Large's and Mary Smith's homicides. As detailed immediately below, the evidence of these prior murders went far beyond what is permissible.

First, about eighteen months before appellant's capture, appellant hired Kelsey to kill his uncle, Ronnie.[180] One night, Ronnie was killed with about nine or ten shots to his upper torso and head with a 0.22 rifle.[181] Ronnie's body was

[180] VHR 46: 1/13/12; 11:20:45, 11:24:40. This portion was played for the jury on Tape 50: 1/20/12; 11:04:00.
[181] VHR 46: 1/13/12; 11:21:48; 11:23:17.