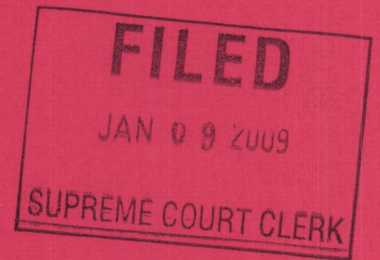


TENDERED



COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2007-SC-833

TIMOTHY KIRBY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HON. WILLIAM CAIN, SPECIAL JUDGE
INDICTMENT NO. 99-CR-00179

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, TIMOTHY KIRBY

Submitted by:

J. BRANDON PIGG
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. William Cain, Special Judge, Laurel Circuit Court, 101 Main Street, London, Kentucky 40743; Hon Danny L. Evans, Commonwealth Attorney, 128 N. Main Street, London, Kentucky 40701; Hon. Barbara Elliott Yeager, PSC, P.O. Box 601, Barbourville, Kentucky 40906; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on January 14, 2009. The record on appeal has been returned to the Kentucky Supreme Court.



J. BRANDON PIGG

INTRODUCTION

Timothy Kirby appeals the November 18, 2005 ruling of the Laurel Circuit Court denying his motion to be exempt under KRS 439.3401(5) from the severe limitation on his parole eligibility contained within KRS 439.3401(3). The November 18, 2005 ruling by Laurel Circuit Court was a final and appealable ruling. The Court of Appeals affirmed the trial court's ruling on August 10, 2007. This Court granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant respectfully requests oral argument.

PREFATORY NOTE

The record in this case contains four volumes of record and is unorganized. Two are labeled "Volume I" and two are labeled "Volume II." One of the sets of "Volume I and II" represents Mr. Kirby's initial proceedings in 1999 and 2000. The second "Volume I" represents Mr. Kirby's RCr 11.42 claim. The second "Volume II" represents the proceeding that occurred in Laurel Circuit Court in 2005 following the Court of Appeals remand in 2004. Additionally, there is another volume that does not indicate a volume number but also contains proceedings from 2005. For the convenience of this Court, Appellant will refer to them as follows:

TR Vol. I.....Volume I of initial proceedings.
TR Vol. II.....Volume II of initial proceedings.
TR Vol III.....Volume I of RCr 11.42 action.
TR Vol IV.....Volume of 2005 proceedings.
TR.....Volume of 2005 proceedings.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTIONi

KRS 439.3401(5).....*passim*

KRS 439.3401(3).....i

STATEMENT CONCERNING ORAL ARGUMENTi

PREFATORY NOTEi

STATEMENT OF THE CASE 1

KRS 439.3401*passim*

Kirby v. Commonwealth, 132 S.W.3d 233 (Ky. App., 2004).....6

ARGUMENT8

**PREJUDICE OF TIMOTHY KIRBY WHEN IT FAILED TO FIND THAT,
UNDER KRS 439.3401, KIRBY WAS EXEMPT FROM BEING CONSIDERED A
VIOLENT OFFENDER.**.....8

Preservation8

Relief Requested8

Procedural History8

Kirby v. Commonwealth, 132 S.W.3d 233 (Ky. App., 2004).....9, 18, 20

KRS 439.3401(1).....9

KRS 533.0609, 12

Commonwealth v. Vincent, 70 S.W.3d 422 (Ky. 2002)*passim*

Grounds For Relief.....11

KRS 403.72016, 19, 20

The Court of Appeals Opinion17

Extreme Emotional Disturbance.....17

<u>Battered Woman Syndrome</u>	19
<u>The Trial Court’s Finding Of Fact That Domestic Violence Occurred</u>	21
<u>Dunn v. Commonwealth</u> , 151 S.W.2d 763 (Ky. 1941)	21
<u>Commonwealth v. Anderson</u> , 934 S.W.2d 276 (Ky. 1996).....	21
<u>Conclusion</u>	22

STATEMENT OF THE CASE

Timothy "Tim" Kirby spent most of the day of October 13, 1999 working with his mother, Miranda Kirby, in her back yard. (Tape No. 3, 06/30/05, 9:34:57). Also working in the yard that day were Tim's girlfriend, his mother, his mother's half brother, James Johnson Jr., "Jr." and James Johnson Jr.'s son, Chris Johnson. (Tape No. 3, 06/30/05, 9:35:07). After working throughout the day, Tim, who had to go to work the next day, retired to his nearby home with his girlfriend as night fell. (Tape No. 3, 06/30/05, 9:35:36).

However, others who had worked that day did not retire. Miranda Kirby testified that she, Jr., Chris and her friend Phillip Neil went to the home of her sister, Stella Johnson who lived nearby. (Tape No. 3, 06/30/05, 9:35:49). According to Miranda, they were "drinking a few beers" and whiskey. (Tape No. 3, 06/30/05, 9:36:07). Miranda testified that she and Phillip Neil, arrived at Stella's home between 9:30 and 10:00 p.m. on the night of October 19, 2005. (Tape No. 3, 06/30/05, 9:36:44). The couple stayed there until 12:00 or 1:00 a.m. (Tape No. 3, 06/30/05, 9:37:02).

Sometime between 10:00 and 10:30 p.m. Jr.'s other son, Brian Johnson, arrived at Stella's home. (Tape No. 3, 06/30/05, 9:37:15). Miranda testified that Brian did not seem drunk when he first arrived at Stella's. (Tape No. 3, 06/30/05, 9:38:06). However, once he was there, Brian took a bottle of whisky and, according to Miranda, "guzzled" a very large drink. (Tape No. 3, 06/30/05, 9:38:13). Brian then openly discussed that he had just taken three Xanax pills. (Tape No. 3, 06/30/05, 9:38:20). According to Miranda, Brian asked the group if he could have a beer, was given one and left shortly thereafter. (Tape No. 3, 06/30/05, 9:38:56).

Sometime around 1:00 a.m. on October 14, 1999, Miranda and her friend Phillip Neil left Stella's and returned to Miranda's home. (Tape No. 3, 06/30/05, 9:39:49). Phillip Neil had been living with Miranda for sometime. (Tape No. 3, 06/30/05, 9:39:35). Chris and Jr., who had also been drinking that night, also left Stella's and returned to Jr.'s nearby home. (Tape No. 3, 06/30/05, 9:39:58).

When Miranda and Phillip got back to Miranda's home, Miranda's elderly mother, Rosa Johnson, was already asleep in her bed. (Tape No. 3, 06/30/05, 9:41:11). Rosa Johnson was staying at Miranda's home on the night of October, 13, 1999. (Tape No. 3, 06/30/05, 9:40:37). Rosa, who was also Tim Kirby's grandmother, was eighty-nine years old in the fall of 1999 and has since passed away. (Tape No. 3, 06/30/05, 9:40:49).

Once Miranda and Phillip were home, Phillip went to the front bedroom of the home and laid down to go to sleep. (Tape No. 3, 06/30/05, 9:41:15). Miranda went to the bedroom where her mother was sleeping and laid down with her. (Tape No. 3, 06/30/05, 9:41:18). However Miranda testified that she was not sleeping well and around 3:00 a.m. she got up and fixed a glass of warm milk. (Tape No. 3, 06/30/05, 9:41:38). Miranda sat at the kitchen table and, as she began to drink her warm milk, began to hear noises outside her home. (Tape No. 3, 06/30/05, 9:41:44).

Suddenly someone began knocking on the back door. (Tape No. 3, 06/30/05, 9:41:53). Miranda testified that she was not going to answer the door because of the late hour and because she was the only one awake. (Tape No. 3, 06/30/05, 9:41:57). When she did not answer the knocking at the door, the person outside began banging on the windows in the living room and around the bedroom of Miranda's home. (Tape No. 3,

06/30/05, 9:42:27). According to Miranda, the person made several trips around the home “beating and banging” on the walls and the windows. (Tape No. 3, 06/30/05, 9:42:51).

Miranda testified that person outside then yelled, “[i]t’s Brian man. All I want is a beer.” (Tape No. 3, 06/30/05, 9:43:08). It was Brian Johnson. Miranda also testified that Phillip Neil yelled, “I don’t have a beer Brian. I don’t have anything.” (Tape No. 3, 06/30/05, 9:43:10). However Brian yelled that he wanted a beer several more times. (Tape No. 3, 06/30/05, 9:43:18).

Several witnesses testified that, when drunk, Brian was prone to aggressive and violent behavior. Phillip Neil testified that he had seen Brian be hostile and belligerent when he was drunk. (Tape No. 3, 06/30/05, 10:47:15). When questioned about the particular violent incident involved in this case, Tammy Kirby, Miranda’s daughter, testified that “it happened all the time.” (Tape No. 3, 06/30/05, 11:10:08).

Brian then returned to the back door, near where Miranda was sitting in the kitchen, and began to beating on the door again. (Tape No. 3, 06/30/05, 9:43:28). Miranda testified that, at this point, she was becoming agitated that Brian was causing such a commotion at such a late hour when people, especially her eighty-nine year old mother, were trying to sleep. (Tape No. 3, 06/30/05, 9:43:30). Miranda opened the door and said, “Brian. What are you doing? My mom is right here trying to sleep.” (Tape No. 3, 06/30/05, 9:43:37).

At that point, Brian stepped through the door into Miranda’s home and grabbed Miranda by the throat with both hands and began choking her. (Tape No. 3, 06/30/05, 9:43:44). The two stood face to face as Brian choked her. (Tape No. 3, 06/30/05,

9:43:44). Brian choked her and told her, "Bitch, I'll kill you." (Tape No. 3, 06/30/05, 9:44:04). Miranda testified that Brian choked her to the point that she thought she was going to pass out. (Tape No. 3, 06/30/05, 9:44:18). She could not talk or yell for help. (Tape No. 3, 06/30/05, 9:44:25). Though marks were not immediately apparent, photographs introduced at trial that had been taken in the days that followed were described to show redness and bruising. (Tape No. 3, 06/30/05, 10:01:10 and Tape No. 3, 06/30/05, 11:41:09 and Tape No. 3, 06/30/05, 9:56:21). Miranda also testified that she had marks on her neck from Brian choking her for at least a week. (Tape No. 3, 06/30/05, 10:23:55).

At some point, Miranda's mother, Rosa, woke up and opened the door to her bedroom which was near the location in the kitchen where Brian was choking Miranda. (Tape No. 3, 06/30/05, 9:44:59). When she did so, Brian let go of Miranda's neck and said, "[c]ome on, Granny. I'm getting you out of here." (Tape No. 3, 06/30/05, 9:45:06). At that point, Phillip Neil, apparently believing an intruder was in the home, came from the room he was sleeping with a stick in his hand. (Tape No. 3, 06/30/05, 9:45:30). Miranda told Brian to let go of her mother and that he was not taking her anywhere. (Tape No. 3, 06/30/05, 9:45:42). Miranda took her mother back into the bedroom and attempted to calm her and assure everything would be alright. (Tape No. 3, 06/30/05, 9:46:11). However, Miranda testified that she was very scared for herself and others in her home. (Tape No. 3, 06/30/05, 10:04:55).

Phillip Neil attempted to calm Brian. (Tape No. 3, 06/30/05, 9:46:02). Yet he testified that Brian "jerked" the stick out of his hand. (Tape No. 3, 06/30/05, 11:04:38).

Neil also testified that he was afraid and that he “didn’t know what he (Brian) was going to do.” (Tape No. 3, 06/30/05, 11:05:40).

After she calmed her mother and saw that Phillip Neil was trying to calm to Brian, Miranda saw an opportunity and exited the home through the back door and proceeded to the house of her son, Tim, for help. (Tape No. 3, 06/30/05, 9:46:35). At the same time, Neil told Brian to get out of the house and he also left through the back door. (Tape No. 3, 06/30/05, 10:59:18).

Miranda testified that Tim’s home was 50-75 feet away from her home. (Tape No. 3, 06/30/05, 9:48:47). She also testified that, before she got there, she heard Brian behind her. (Tape No. 3, 06/30/05, 9:46:42). He was following behind her and said “[y]eah...go get Tim.” (Tape No. 3, 06/30/05, 9:46:42). Miranda began to scream when she realized that Brian was following behind her. (Tape No. 3, 06/30/05, 9:46:47). Miranda also testified that, at some point while he was behind her, Brian yelled, “[a]ll you sons of bitches will be dead by morning.” (Tape No. 3, 06/30/05, 10:19:50).

As she got to Tim’s home, she testified that she was screaming “Tim. Get up.” (Tape No. 3, 06/30/05, 9:46:56). She testified that she beat on Tim’s door and screamed “get up now. Brian just tried to kill me.” (Tape No. 3, 06/30/05, 9:46:59). In response to Miranda’s screams, Tim Kirby came out with his gun. (Tape No. 3, 06/30/05, 9:47:12). Once outside, Miranda testified that Tim fired approximately three shots in the air. (Tape No. 3, 06/30/05, 10:04:29). Tim then told his mother that he was going to take her back to her place. (Tape No. 3, 06/30/05, 10:19:55). As the two walked back to her place, Miranda testified that Tim, still carrying his gun for protection, “tripped or something”,

the gun went off and the shot hit Brian, who was several yards away. (Tape No. 3, 06/30/05, 10:20:01). Brian Johnson died as a result of the wound.

On November 19, 1999, Tim Kirby was indicted for Murder in Laurel Circuit Court. (Transcript of Record “TR”, Vol. I, p. 1). On April 24, 2000, Tim Kirby entered a plea of guilty to the amended charge of Manslaughter, First Degree. (TR, Vol. I, pp. 45-46). As a result of his plea, he was sentenced to Fourteen and One-Half years and designated a violent offender. (TR, Vol. I, pp. 46-47). On December 13, 2002, Tim Kirby filed a motion, pro se, in the Laurel Circuit Court entitled “MOTION FOR EXEMPTION FROM KRS 439.3401.” (TR, pp., 4-8). The motion requested the trial court to determine that Mr. Kirby, under 439.3401(5)—domestic violence, was exempt from being a violent offender. (Id.). The Commonwealth opposed this motion. (TR, p. 14). On February 13, 2003, the trial court denied Tim Kirby’s motion without having a hearing. (TR, p. 23). Mr. Kirby appealed. (TR p. 30).

The Court of Appeals found that Mr. Kirby and his case came within the availability of the exception for victims of domestic violence. The Court of Appeals also vacated and remanded the case for an evidentiary hearing to determine if the allegations of domestic violence were true. Kirby v. Commonwealth, 132 S.W.3d 233 (Ky. App., 2004). (*Kirby I*).

A hearing was held on June 30, 2005 and, after the hearing, briefs were submitted on behalf of both Kirby and the Commonwealth. The trial court made a finding of fact that the choking of Miranda did occur. However, the trial court ruled that Kirby had not established a connection or relationship between the domestic violence and the violent offence for which he was convicted. (TR, Vol. II, pp. 210-213). Therefore, the court

determined, Tim Kirby did not come within the purview of KRS 439.3401 as to parole eligibility requirements and denied his motion. (Id.). Kirby appealed.

The Court of Appeals issued an opinion affirming on August 10, 2007. In its twenty two page opinion, the Court of Appeals focused approximately nineteen pages primarily on its disagreement with the trial court's finding that the domestic violence (the choking) had actually occurred. That the domestic violence had occurred was a specific finding of fact by the trial court that was not appealed by the Commonwealth and was, therefore, not even before the Court. Yet the Court of Appeals, while acknowledging that Miranda did clearly testify that Brian had choked her, devoted copious pages of the opinion to detailing minor inconsistencies of an issue (whether the choking occurred) which was not even before the Court. The Court of Appeals then, though the issue was not appealed by the Commonwealth, determined that the trial court erred when it found that the choking occurred. (Opinion, p. 18, fn. 4).

The Court of Appeals went on to find that the trial court correctly found that the shooting was not "connected" to the choking. (Id.. p. 19). The Court of Appeals then went on to *sua sponte* state that Tim Kirby was additionally not entitled to the provisions of KRS 439.3401 (5) because Miranda was only abused "once" instead of "repeatedly" and because, apparently, Kirby did not provide sufficient evidence that Brian abused Miranda "because she was his aunt." (Opinion, pp. 21-22).

Tim Kirby filed a Motion for Discretionary Review with this Court which was granted on October 15, 2008.

Appellant shall state further facts as needed in the body of the Brief.

ARGUMENT

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF TIMOTHY KIRBY WHEN IT FAILED TO FIND THAT, UNDER KRS 439.3401, KIRBY WAS EXEMPT FROM BEING CONSIDERED A VIOLENT OFFENDER.

Preservation

This issue is preserved by the hearing held on June 30, 2005 in Laurel Circuit Court. Evidence was presented and both Appellant and the Commonwealth filed briefs with the court. Further, the Court issued specific Findings of Fact, Conclusion of Law and Judgment. (TR, Vol II, pp. 210-213). The trial court declared the Findings of Fact, Conclusion of Law and Judgment a final and appealable ruling. (Id., at 212). The Court of Appeals issued an opinion affirming on August 10, 2007. Tim Kirby filed a Motion for Discretionary Review with this Court which was granted on October 15, 2008. Therefore, this issue is preserved for appellate review.

Relief Requested

Since both the trial court and the Court of Appeals erroneously found that KRS 439.3401 was not applicable to Tim Kirby, Appellant respectfully requests that the trial court's ruling be reversed and remanded back to the trial court with instructions that KRS 439.3401 be applied to Tim Kirby with respect to his parole eligibility.

Procedural History

Mr. Kirby's first motion asking that the trial court determine that he was within the purview of 439.3401(5) and, as such, exempt from being considered a violent offender was denied on February 13, 2003. (TR, p. 23). Tim Kirby appealed to the Kentucky Court of Appeals. The Court of Appeals found that Tim Kirby was eligible for the exemption contained in 439.3401(5). Kirby v. Commonwealth, 132 S.W.3d 233,

236-237 (Ky. App., 2004). The Court stated, “[w]hile it is true that Kirby does not present the typical fact pattern brought to mind by ‘domestic violence,’ the statutes in question are written broadly enough to encompass the events Kirby alleges occurred.” Id. at 234.

Specifically, the Court explained that because Kirby pled guilty to a class B felony which involved the death of the victim, he was within the definition of violent offender contained in KRS 439.3401(1)¹. Id. at 234. The Court also found that, since Kirby was considered a “violent offender” under KRS 439.3401(1), he would not be eligible for parole until he has served at least 85 percent of his sentence as required by KRS 439.3401(3)². Id. However, as the Court noted, KRS 439.3401(5) provides that the enhanced penalties for violent offenders “shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060.” Id. The question, the Court concluded, was whether Kirby was eligible for this exception. Id. at 224-225.

After careful analysis, the Court determined the familial relationship between Brian Johnson, Miranda Kirby and Tim Kirby, along with the nature of the crime, rendered Tim eligible for the 439.3401(5) exception. Id. at 236. As a result, the Court

¹ KRS 439.3401 states: “As used in this section, ‘violent offender’ means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032 or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as proscribed by KRS 509.040, or robbery in the first degree. The court shall designate in its judgment if the victim suffered death or serious physical injury.

² KRS 439.3401(3) states: “A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.”

directed the Laurel Circuit Court to hold an evidentiary hearing to determine the truth of Kirby's allegations. Id. at 237.

This hearing was held in Laurel Circuit Court on June 30, 2005. Witnesses, including Miranda Kirby and Phillip Neil, testified to the events surrounding the episode of domestic violence in the early morning hours of November 14, 1999. Shortly before the hearing concluded, the judge informed counsel that he did not need to hear anything further regarding Miranda's injuries because he was going to find that allegations of domestic violence were in fact true. (Tape No. 3, 06/30/05, 11:41:59—11:42:50). However the judge still declared that, even though he had determined that the alleged domestic violence incident did occur, it still had to be resolved whether Tim Kirby was eligible for the exception contained in KRS 439.3401(5). The trial court permitted counsel for both sides to submit briefs before rendering its decision.

In its brief to the trial court, the Commonwealth argued that under Commonwealth v. Vincent, 70 S.W.3d 422 (Ky. 2002), the offense must be "connected to the domestic violence" and, in Mr. Kirby's case, the domestic violence had occurred "several minutes" earlier.³ (TR, Vol II, p. 204). The Commonwealth also argued that, since the shot that hit and killed Brian Johnson was fired accidentally, there could be "no connection between the domestic violence and the shooting." (TR, Vol II, p. 205). The trial court agreed with the Commonwealth and issued an order explaining that, even though it made a finding that the choking of Miranda Kirby did occur, Mr. Kirby did not come within the purview of 439.3401(5) because a "significant amount of time" passed between the choking and the shooting. (TR, Vol II, p. 212) The court also found that,

³ In their "Commonwealth's Response to Defendant's Memorandum", the Commonwealth only cited Commonwealth v. Vincent. Similarly, in the its "Findings of Facts, Conclusion of Law and Judgment," the trial court's only citation to case law was to Commonwealth v. Vincent.

because the shooting was “accidental,” it was not connected to the domestic violence against Miranda Kirby. (Id).

Grounds For Relief

The trial court erred when it incorrectly determined that, under Commonwealth v. Vincent, Tim Kirby was not within the purview of KRS 439.3401(5).

- A. The Fact That The Actual Shot That Struck And Killed Brian Johnson Was Fired Accidentally Does Not Mean That Tim Kirby Is Not Within The Purview Of KRS 439.3401(5).

The trial court found, as the Commonwealth had argued in their brief, that, under Vincent, since the shot that killed Brian Johnson was fired accidentally, it was not “connected” to the domestic violence against Miranda Kirby. The trial court misunderstood and misapplied the holding of Vincent.

The facts of Vincent demonstrate that the focus of whether a defendant is eligible for the domestic violence or abuse exception of KRS 439.3401(5) is simply if there is a connection or relationship between the domestic violence and the violent offense for which the defendant stands convicted. The mere fact that the defendant in Vincent claimed that the shooting was accidental does not mean all accidental shootings are exempt from the exception of KRS 439.3401(5).

In Vincent, the appellant shot and killed her ex-husband. She had gone to the home of her ex-husband, Bryan Hitchcock, because she caught him in a lie and wanted to talk with him about it. She also went armed with a handgun. Her ex-husband was not home, but his roommate, Donald Lawery, was home and allowed her to wait for her ex-husband to return. When he returned, she confronted him and the two began to argue. Testimony of what happened next varied. Id. at 423.

Lawery, the ex-husband's roommate who witnessed the events, testified that appellant dropped a camera on the floor and Hitchcock reached down to pick it up. At that point, according to Lawery, Vincent pulled the handgun from her purse and shot Hitchcock. Id.

Vincent testified the handgun fell out of her coat and slipped between the cushions of the couch. As she retrieved it, Hitchcock asked her what she had. She showed him the gun and said, "This." Vincent testified that she then accidentally pulled the trigger while showing Hitchcock the gun. Id.

After Vincent was convicted, the trial court held a hearing to determine whether she was a victim of domestic violence for the purposes of KRS 439.3401 and KRS 533.060. She presented sufficient evidence to support a finding that she had been a victim of domestic abuse and that Hitchcock was a victimizer. Id. However, as the Court noted, Vincent offered absolutely **no evidence** at the hearing that connected the shooting with the history of domestic violence between Hitchcock and her. Id. at 425. (Emphasis added).

Simply put, the Court in Vincent did not determine Vincent fell outside the purview of KRS 439.3401(5) because she allegedly shot her husband "accidentally." Regardless of whether the shooting of Hitchcock was accidental or intentional, the Court determined Vincent was not within the purview of KRS 439.3401(5) because she failed to offer **any** evidence connecting the shooting of her ex-husband to the abuse she suffered. By contrast, as will be discussed *infra*, Kirby provided extensive testimony and evidence that the shooting in this case was connected to the domestic violence against Miranda.

Therefore, to simply conclude, as the trial court did, that Tim Kirby is not within the purview of 439.3401(5) because the shot that killed Brian Johnson was fired accidentally is a misunderstanding of the holding in Vincent. Moreover, while not only being an extreme oversimplification of the holding of Vincent, it is also contrary to the purpose of KRS 439.3401(5). Sadly, many domestic violence episodes culminate in a violent offense being committed. Many of these, as KRS 439.3401(5) recognized, are committed by victims of abuse, either against their attackers or in protecting another. In such circumstances, it is not difficult to imagine scenarios where a shooting, though accidental, could be inextricably tied to the domestic violence it sought to repel. Situations where a victim of domestic violence seeks to disarm their assailant, but in the resulting struggle the gun is accidentally fired or where a victim, completely ignorant of the mechanics of a firearm, accidentally and as a result of their ignorance, fires the weapon. Both of these situations would be considered “accidents” yet they are the very situations that KRS 439.3401(5) was enacted to address. Yet under the interpretation of the trial court and the Court of Appeals, these victims of domestic violence would not fall under the purview of KRS 439.3401(5).

B. The Trial Court Erred When It Found That The Domestic Violence Upon Miranda Kirby Was Too Remote In Time To Be Directly Connected To The Shooting Of Brian Johnson.

As stated before, in Vincent, this Court held that, in order to be eligible for the exception in KRS 439.3401(5) a defendant, who is also a victim of domestic violence, must establish a **connection or relationship between the domestic violence and the violent offense for which the defendant stands convicted.** Id.

At the June 30, 2005 hearing, the trial court made a finding that the choking of Miranda Kirby did occur. (TR, Vol II, p. 212). However, the trial court found that the domestic violence upon Miranda Kirby was too remote in time to be “**directly connected** to shooting of Brian Johnson.”⁴ (Id.) (Emphasis added).

To begin, the standard described by the Vincent Court is that it is only necessary to show a “connection or relationship” between the domestic violence and the crime committed in order to come within the purview of KRS 439.3401(5). 70 S.W.3d at 425. The trial court erred in requiring Kirby to show that the shooting of Brian Johnson was “directly connected” to the domestic violence perpetrated on his mother, Miranda Kirby. Under the correct standard, Tim Kirby presented ample evidence that the shooting of Brian Johnson was connected and had a strong relationship to the domestic violence perpetrated on his mother only minutes earlier.

In order to demonstrate that the shooting had a relationship and was connected to Brian Johnson, Tim Kirby presented evidence at the hearing as to the following:

- Brian Johnson choked Miranda Kirby. (Tape No. 3, 06/30/05, 9:43:44).
- He threatened her life by saying, “Bitch, I’ll kill you.” (Tape No. 3, 06/30/05, 9:44:04).
- The choking was so severe that Miranda could not scream and she thought she was going to pass out. (Tape No. 3, 06/30/05, 944:18).
- The choking was so severe that, in the days that followed, there was redness and bruising on her neck. (Tape No. 3, 06/30/05, 10:01:10 and Tape No. 3, 06/30/05, 11:41:09).

⁴ For the Court’s convenience, a copy of the trial court’s Findings of Facts and Conclusions of Law stating that Kirby was not eligible for KRS 439.3401(5) because the shooting was not “directly connected” to the domestic violence is attached to this brief.

- Phillip Neil confronted Brian Johnson with a stick which Brian “jerked” from Neil’s hand. (Tape No. 3, 06/30/05, 11:04:38).
- As soon as Miranda calmed her elderly mother, she fled to Tim Kirby’s house for help. (Tape No. 3, 06/30/05, 9:46:35).
- Brian exited the home moments after Miranda did. (Tape No. 3, 06/30/05, 10:59:18).
- Brian followed Miranda as she proceeded the 50-75 yards to Tim Kirby’s house. (Tape No. 3, 06/30/05, 9:48:47).
- Brian yelled, “Yeah. Go get Tim” and “All you sons of bitches will be dead by morning” as he continued following her. (Tape No. 3, 06/30/05, 9:46:42 and Tape No. 3, 06/30/05, 10:19:50).
- Miranda woke Tim Kirby from his sleep by banging on his door and screaming “Get up” and “Get up now. Brian just tried to kill me.” (Tape No. 3, 06/30/05, 9:46:56):
- That upon hearing this, Tim Kirby answered the door with his gun. (Tape No. 3, 06/30/05, 9:47:12).
- He fired three warning shots in the air. (Tape No. 3, 06/30/05, 10:04:29).
- He walked Miranda back to her home and carried his gun with him as they walked. (Tape No. 3, 06/30/05, 10:20:01).
- That he tripped or lost his balance, the gun went off, and the shot hit Brian several yards away. (Tape No. 3, 06/30/05, 10:20:03).

These facts demonstrate how the shooting that occurred that night was connected and had a strong relationship with the domestic violence perpetrated on Miranda Kirby. Moreover, they show that the domestic violence continued from the when Brian Johnson was actually choking Miranda Kirby, to when he followed her to Tim's home and made threats as he followed her.

At the trial court level, the Commonwealth argued that the choking of Miranda Kirby was not connected to the shooting of Brian Johnson because "several minutes" had passed. (TR, Vol II, p. 204). Specifically, the Commonwealth argued that "several minutes would have passed before Miranda left the trailer and went to the Defendant's (Tim's) trailer" and that "Miranda then would have waited for the Defendant to wake up and get dressed and grab his assault rifle." (Id.).

KRS 403.720 states:

"Domestic violence and abuse" means physical injury, serious physical injury, sexual abuse, assault, or the **infliction of fear** of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple. (Emphasis added).

Under this definition, Appellant contends that the domestic violence did not simply end when Brian Johnson stopped physically choking Miranda Kirby. Despite the Commonwealth's contentions to the contrary, the domestic violence continued through the supposed "several minutes" afterward as Phillip Neil tried to calm Brian Johnson in the living room and Miranda tried to calm her elderly mother in her bedroom. It continued as Miranda, fearful for herself and the other people in her home, exited through the back door and proceeded to Tim's house for help. It continued as Brian Johnson shouted "All you sons of bitches will be dead by morning" while he followed her to Tim Kirby's house. It continued as she fearfully and frantically banged on Tim's door

shouting for him to wake up and that Brian had just tried to kill her. It continued through the time it took Tim Kirby to answer the door. It continued as Tim fired his rifle in the air. Finally, it also continued as Tim, still armed with his rifle for protection, escorted his mother back to her home and ultimately shot Brian Johnson.

All the actions taken by Miranda and Tim Kirby in the minutes that followed Brian Johnson choking Miranda, including the shooting of Brian Johnson, are connected to the domestic violence of physically choking of Miranda Kirby. They are also connected and have a relationship with the infliction of fear that additional domestic violence was imminent, because Brian Johnson followed Miranda to Tim's home and made threats to her as he followed.

The Court of Appeals Opinion

The Court of Appeals opinion in this case offers a myriad of supposed reasons, many of which were not briefed by either the Appellant or Appellee, why it believed Kirby was not entitled to the provisions of KRS 439.3401(5). Appellant will discuss them as follows.

Extreme Emotional Disturbance

On April 24, 2000, Tim Kirby entered a plea of guilty to the amended charge of Manslaughter, First Degree. In Kirby I, the Court of Appeals, when discussing the manslaughter plea, mentions the phrase "extreme emotional disturbance" twice.

Specifically, the Court said:

"The agreement explained that the Commonwealth agreed to the lesser charge because '[i]t is conceivable that a jury could determine that the reported attack on [Kirby's] mother created an extreme emotional disturbance with justification which supports Manslaughter First Degree.' The 'reported attack' referred to is described by Kirby as an incident in which Johnson allegedly attacked and choked Kirby's mother. Kirby

describes the shooting of Johnson as being done to prevent Johnson from killing his mother; however, his plea to manslaughter forecloses the possibility that it could provide a complete defense. The plea agreement by implication characterizes the attack as one that did not create an imminent risk of death or severe bodily injury but, rather, was an event that precipitated an extreme emotional disturbance which led to the shooting.”

Kirby, 132 S.W.3d, at 234.

From this passage, the Court of Appeals incorrectly determined that the “mandate” of Kirby I was:

“...to determine if the evidence supports that the shooting was a result of extreme emotional disturbance to prevent Brian from killing Kirby’s mother and that the shooting was related to an act of domestic violence.”

(Opinion, p. 4).

This is simply incorrect. The “mandate” of Kirby I was specifically detailed in the final paragraph of the opinion which stated:

“On a different note, the Commonwealth has repeatedly described Kirby’s allegations regarding the attack on his mother as ‘refuted by the physical evidence.’ However, at this stage in the proceedings there has been no evidence introduced which, of course, precludes any factual determination. For this reason, the circuit court must hold an evidentiary hearing to determine the truth of Kirby’s allegations.”

Kirby, 132 S.W.3d at 237. Put simply, the “mandate” of Kirby I was for the trial court to hold a hearing to determine if Kirby’s allegations of domestic violence were true. The trial court held such a hearing and made a specific finding of fact that the domestic violence, in this case the choking, did in fact occur.

Kirby I was in no way, as the Court of Appeals in this case opined, a mandate that Tim Kirby was required to prove that he was acting under extreme disturbance.⁵ Nor

⁵ The Court of Appeals opinion that, under Kirby I, Kirby bore the burden of demonstrating he was acting under extreme emotional disturbance after entering a plea to a charge of manslaughter is particularly puzzling. It was not an issue raised by Appellee. More importantly, the Commonwealth, prior to plea

does it require Kirby to show that the shooting was “to prevent Brian from killing” his mother. Neither are requirements that must be met to be within the purview of KRS 439.3401(5).

Battered Woman Syndrome

The Court of Appeals in this case also stated, *sua sponte*, that Tim Kirby was not entitled to the provisions of KRS 439.3401 (5) because Miranda was only abused “once” instead of “repeatedly” and because, apparently, Kirby did not provide sufficient evidence that Brian abused Miranda “because she was his aunt.” (Opinion, pp. 21-22). The opinion states that this domestic abuse only occurred once, instead of “repeatedly” and therefore Kirby “simply does not deserve the benefit of the domestic violence exception.” (Id. at 21). However, as the Court’s own statement acknowledges, KRS 439.3401(5) states that it is intended to protect those suffering from **domestic violence**.

KRS 403.720 **specifically defines** domestic violence as:

“...physical injury, serious physical injury, sexual abuse, assault, or the **infliction of fear** of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple”

Nowhere in that statutory definition is there **any** discussion or requirement that, as the Court of Appeals claimed, the abuse has to occur “repeatedly” before the protection is available. The Court of Appeals incorrectly, and alarmingly, appears to take a position that domestic violence is inconsequential unless it is a repeated act. This position is clearly refuted by the plain language of the KRS 439.3401(5) and the definition of domestic violence in KRS 403.720. Moreover, it is completely contrary to the position

agreement, filed a motion to amend the indictment to the offense of “Manslaughter First Degree by shooting & killing Brian Johnson **while under Extreme Emotional Disturbance**. (TR, Vol. 1, p. 44). The Commonwealth then entered into a plea agreement with Kirby to charge of Manslaughter, First Degree. (TR, Vol. III, pp. 122-123).

the Court of Appeals took in Kirby I. In Kirby I, the Court specifically cited KRS 403.720 and then stated “[t]he above language **includes a single incident of assault within the definition of ‘domestic violence.’**” Kirby, 132 S.W.3d at 235. (Emphasis added).

The clear intent of KRS 439.3401(5) was to exclude from violent offenders those who, at the time they acted, had been victims of domestic violence. In Kirby I, the Court of Appeals determined that this also included defendants who commit violent offenses against an individual who has committed an act of domestic violence against a family member. Id., 236.

By contrast, the Court of Appeals in this case claimed that the legislature intended to exclude, and thereby discount, those who are the victims of domestic violence on the grounds that they were not victims of domestic violence “repeatedly.” However, if this had been the legislature’s intent, it either could have specifically said it was their intent or not referenced the clear and plain definition of domestic violence which encompasses a single event. Instead, the legislature used specific language clearly demonstrating that the provisions of KRS 439.3401(5) extend to those who are the victims of domestic violence regardless of the number of occurrences.

With respect to the Court of Appeals opinion that, in order to fall within the purview of KRS 439.3401, Kirby was required to show that Brian attacked Miranda “because she was his aunt,” it is unclear how this standard could ever be met. Appellant is unaware of any scenario where an act of domestic violence occurs “because of the family relationship.” Domestic occurs for many reasons-violent personalities, difficulty managing anger or, as in this case, extreme intoxication. In the most stereotypical

domestic violence scenario of a drunken husband who abuses his wife, he does so, not “because” she is his wife, but “because” of his drunkenness.

The Trial Court’s Finding Of Fact That Domestic Violence Occurred

As discussed *supra*, the Court of Appeals in this case focused nineteen pages primarily on the facts of the case and its disagreement with the trial court’s finding that the domestic violence (the choking) had actually occurred, an issue that was neither preserved nor even raised by the Commonwealth. It was a specific, unchallenged finding of fact by the trial court not to be disturbed unless clearly erroneous.

The Court of Appeals in this case recognized as much. The Court acknowledged that, under Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941), as the fact-finder, the trial court has the sole responsibility to weigh the evidence and judge the credibility of witnesses. (Opinion, p. 6). The Court further acknowledged that, under Commonwealth v. Anderson, 934 S.W.2d 276 (Ky. 1996), the trial court is free to believe all of a witness’s testimony, part of a witness’s testimony or none of it. (Opinion, p. 6). Yet the Court then, inexplicably, proceeded through its opinion detailing how it believed the trial court improperly weighed certain evidence and how it believed the trial court improperly weighed and gave credibility to the testimony of Miranda Kirby, Phillip Neal and Tammy Kirby. This is completely contradictory to Dunn and Anderson.

Evidence was submitted to the trial court through the testimony of Miranda Kirby, Phillip Neal and Tammy Kirby as well as photographs to support the trial court’s finding of fact that the choking did occur. It was therefore not clearly erroneous for the trial court to make a finding of fact that the abuse occurred. More importantly, the Court of Appeals erred when it made a determination that the trial court’s finding of fact, which

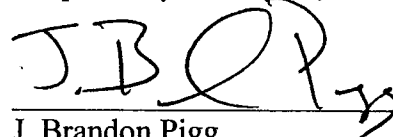
was not preserved and not appealed or raised by Appellee, was in error. This was compounded when the Court not only addressed the finding of fact in a four page footnote, but also incorporated its doubt that the abuse occurred into its analysis on the merits of Kirby's claim.⁶

Sufficient evidence was put to the trial court that a finding that the domestic violence occurred was not "clearly erroneously." More importantly, sufficient evidence was submitted to demonstrate that the eventual shooting in this case was strongly connected to that domestic violence.

Conclusion

Therefore, since the trial court erroneously found, and the Kentucky Court of Appeals affirmed, that KRS 439.3401 was not applicable to Tim Kirby, Appellant respectfully requests that the Court of Appeal's opinion be reversed and the case remanded back to the trial court with instructions that KRS 439.3401 be applied to Tim Kirby with respect to his parole eligibility.

Respectfully Submitted,



J. Brandon Pigg
COUNSEL FOR APPELLANT
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Ky 40601

⁶ On page twenty-one of the Court of Appeals opinion in this case, it stated:
"According to Miranda Kirby's own testimony, Brian Johnson had never assaulted her prior to the alleged choking, making the choking incident, *assuming* that it happened in the first place." (No emphasis).

This statement, along with the four page footnote, demonstrates that the Court's notion that the choking did not occur influence, at least to some degree, its ultimate determination of this case.