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**

REPLY BRIEF FOR APPELLANT, TIMOTHY KIRBY

Submitted by:

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The undersigned does certify that copies of this Reply 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. Kenneth Wayne Riggs, Asst. Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on May 21, 2009. The record on appeal was not checked out for the purpose of this Reply Brief.

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PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to clarify where there are discrepancies as to law or fact between Appellant's and Appellee's briefs.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. BOTH THE COURT OF APPEALS AND APPELLEE MISINTERPRET COMMONWEALTH v. VINCENT.

Again, the facts of Commonwealth v. Vincent, 70 S.W.3d 422 (Ky. 2002) 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. Contrary to Appellee's contention, 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).

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). Vincent merely showed she had been the victim of domestic violence at some time by the victim, but failed to show how her shooting of the victim was **connected** to that domestic violence and, thus, she did not qualify for the exception.

Simply put, this Court in Vincent did not determine Vincent fell outside the purview of KRS 439.3401(5) **because** she allegedly shot her husband "accidentally." Whether the shooting of Hitchcock was accidental or intentional, this 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, Kirby provided extensive testimony and evidence that the shooting in this case was connected to the domestic violence against Miranda.

More importantly, Appellee asks "how can you receive the leniency intended for victims that kill as a last resort out of fear, when the testimony clearly showed that you killed out of accident?" (Appellee's brief, p. 10). To begin, the question falsely implies that the exception exists only for those who kill as a "last resort out of fear." As Appellee notes throughout their brief, Vincent only requires **a connection** or relationship between the domestic violence and the violent offense for which the defendant stands convicted. At no point has this Court stated, nor does the statute state, that the exception only applies to those that kill as a "last resort out of fear."

Setting aside Appellee's hyperbole, the remainder of the question regarding those who commit an act accidentally receiving the exception is easily answered. First, KRS 439.3401(5) makes no distinction regarding "accident" versus intentional act. In explaining how parole for violent offenders shall be at least eighty-five percent (85%), KRS 439.3401 (5) states:

> "this section 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 with regard to the offenses involving the death of the victim or serious physical injury to the victim. The provisions of this subsection shall not extend to rape in the first degree or sodomy in the first degree by the defendant."

No where in that statute is any requirement that the offense be intentionally committed and with good reason. As Appellant has stated, 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).

A clear hypothetical demonstrating the flaws in Appellee's argument would be a victim of domestic violence who, though ignorant of gun safety, retrieves a handgun to repel her attacker. Pointing the firearm at their attacker with the hammer cocked, they demand the attacker leave. The attacker complies, turns, and walks away. The victim, thinking the attack is over, attempts to decock the hammer on the firearm, but completely misjudges the amount of pressure that must be maintained to prevent the hammer from striking with too much force and firing the weapon and, as a result, the weapon "accidentally" discharges and kills the attacker. Under the Appellee's flawed argument regarding "accident," this victim would not qualify for the exception. Such a concept not only offends the purpose of the statute but also reflects an unsound analysis of KRE 439.3401 and Vincent.

II. BOTH THE COURT OF APPEALS AND APPELLEE INCORRECTLY CONTEND THAT KRS 439.3401 (5) ONLY APPLIES TO VICTIMS OF REPEATED DOMESTIC VIOLENCE CONSTITUTING "BATTERED WOMAN SYNDROME."

In its brief, Appellee contends that the Court of Appeals was correct when it, *sua sponte*, found that the KRS 439.3401 (5) applies to those who have been repeatedly abused to the point where they fit under "battered woman syndrome." (Appellee's brief, p. 9). Such a finding is not supported by the statute or caselaw.

In its opinion in this case, the Court of Appeals incorrectly determined that, under Holland v. Commonwealth, 192 S.W.3d 433 (Ky. App. 2006), the exception under KRS 439.3401 (5) was intended to only give lenience to those women who have suffered from "battered woman syndrome[1]." (Opinion, pp. 20-21). Appellee further contends that the Court of Appeals was correct when it further opined that Kirby did not "deserve" the benefit of KRS 439.3401 (5) because Miranda was the victim of violent domestic abuse only once. (Appellee's brief, p. 9) and (Opinion, p. 20-21).

However, 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, consideration or requirement that, as the Court of Appeals claimed, the abuse has to occur "repeatedly" before the protection is available. Appellee and the Court of Appeals incorrectly, and alarmingly,

[1] Oddly, after claiming that the KRS 439.2301 (5) exception is reserved only for those who are repeatedly abused to the point of being victims of "battered woman syndrome," the Court of Appeals then bizarrely states that "[h]ad Kirby walked in while Brian was allegedly choking his mother or threatening her with further violence, we might conclude otherwise." (Opinion, p. 21). It is unclear how the Court of Appeals can say, on one hand, that the KRS 439.3401 (5) exception is reserved only for those who are repeatedly abused to the point of being victims of "battered woman syndrome" while on the other hand saying they might have found Kirby "deserving" of the exception had he witnessed the singular instance of abuse against Miranda Kirby. Such a position is contradictory and not logical.

appear 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 the Court of Appeals took in Kirby I. It cannot be overstated that the same Court of Appeals in the **same** case, Kirby I, **specifically** cited KRS 403.720 and then stated "[t]he above language **includes a single incident of assault within the definition of 'domestic violence.'"** 132 S.W.3d 233 (Ky. App., 2004). (*Kirby I*). (Emphasis added). Yet in this case, Kirby II, the Court of Appeals has chosen to completely contradict itself with an unsubstantiated holding that KRS 439.3401 (5) only applies to those who can establish that they are victims of "battered woman syndrome."

The language of KRS 439.3401 (5) is clear. It says it applies to those who have "been a victim of domestic violence or abuse." If the legislature's intent in enacting KRS 439.3401 (5) was that it only applies to those that can establish that they are victims of "battered woman syndrome," 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. As such, any contention that one must demonstrate that they are victims of "battered woman syndrome" is simply an incorrect interpretation of KRS 439.3401 (5).

III. THE DOMESTIC VIOLENCE DID NOT END WHEN BRIAN JOHNSON STOPPED CHOKING MIRANDA KIRBY.

Appellee repetitively sites to Miranda's testimony that possibly fifteen (15) minutes elapsed from the actual choking to the shooting as evidence that the shooting was

not a connection or relationship between the shooting and the domestic violence. (Opinion p. 4 and p. 11). However, the domestic violence did not simply end when Brian Johnson stopped physically choking Miranda Kirby. It continued as Miranda, fearful for herself and the other people in her home, went to the bedroom to comfort her mother as Brian Johnson argued with Phillip Neil and when Miranda 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.

It should also be noted that the position of Appellee and Court of Appeals that, since possibly up to fifteen (15) minutes elapsed between the actual choking and the shooting, Kirby does not qualify for the KRS 439.3401 (5) exception has been rejected by the Court of Appeals in Holland. In Holland, the Court of Appeals stated that it did "not conclude, as the trial court did, that the statute and Vincent require that the domestic abuse have been contemporaneous with the offense for which the defendant was charged." Holland, 192 S.W.3d at 438.

In sum, 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 repeated threats to her as he followed.

IV. EXTREME EMOTIONAL DISTURBANCE.

Mr. Kirby pled guilty to Manslaughter in the First Degree. By accepting that plea, the Commonwealth agreed that he was acting under extreme emotional disturbance and thereby waived any claim that he was not acting under extreme emotional disturbance. However, Appellee contends that the Court of Appeals properly reviewed the evidence to determine if sufficient evidence existed to show that Kirby was acting under extreme emotional disturbance. (Appellee's brief, p. 12). Appellee's sole ground justifying the Court of Appeals reviewing an issue that was not raised and had been waived by the Commonwealth was:

> "On the day of the plea, the Commonwealth moved to amend the murder charge to manslaughter in the first degree, while under extreme emotional disturbances. On the plea sheets, the Commonwealth gave the reason for the amendment: a jury may find that Appellant was acting under EED." (Internal cites omitted).

(Appellee's brief, p. 12).

Appellee's alleged justification for reviewing this un-raised, unpreserved and waived issue is woefully insufficient. In fact, the Court of Appeals reviewed the issue of extreme emotional disturbance solely because it 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. He had already entered a plea to Manslaughter in the First Degree while under extreme emotional disturbance that had not been challenged by the Commonwealth. Nor 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).

CONCLUSION

For the foregoing reasons, Timothy Kirby requests that his conviction be vacated and the case remanded for a new trial.

Respectfully Submitted,

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