SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000783-MR

CARLOS LAMONT ORDWAY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
CIR. NO. 07-CR-01319

COMMONWEALTH OF KENTUCKY — APPELLEE

# REPLY BRIEF FOR APPELLANT

EMILY HOLT RHORER
ASSISTANT PUBLIC ADVOCATE

BRANDON NEIL JEWELL
ASSISTANT PUBLIC ADVOCATE

DEPT. OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KY 40601

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, to: Hon. Pamela R. Goodwine, Judge, Fayette Circuit Court, 382 Robert F. Stephens Courthouse, 120 N. Limestone St., Lexington, Kentucky 40507; Hon. Ray Larson, Commonwealth Attorney, 116 N. Upper St., Suite 300, Lexington, Kentucky 40507; Hon. Sam Cox, Assistant Public Advocate, 163 Short St., Suite 210, Lexington, Kentucky 40507; Hon. Dennis Shepherd, Kentucky Department of Veterans Affairs, 1111B Louisville Road, Frankfort, Kentucky 40601 and by state messenger service to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on July 13, 2012. We hereby further certify that the record was not checked out in preparation of this Reply Brief.

Emily Holt Rhorer

Brandon Neil Jewell

## Purpose of Reply Brief

The purpose of this reply brief is to respond to the arguments and/or legal authority contained in the Attorney General's Brief (hereinafter cited as AG Brief). If Carlos does not respond specifically to an argument, then Carlos reasserts the argument made in the Opening Brief.

## STATEMENT OF POINTS AND AUTHORITIES

**Note As To Attorney General Counterstatement of the Case**

The Attorney General says Carlos' defense at trial contradicted the 90 second statement he gave Det. Wilson regarding which individual's gun he grabbed first when Lee Lee and Hot Rod were robbing him. AG Brief pg. 6. One must remember though, Det. Wilson did not record this 90 second interview. VR No. A-14-2: 7/26/10; 4:57:00. Rather, he took handwritten notes that he later transcribed. Id. It is entirely possible that his handwritten notes (or the version he typed out after deciding to charge Carlos) were not a completely accurate and verbatim version of the actual interview.

The Attorney General also states that Carlos testified he did not know Patrick Lewis (Lee Lee) at all, citing to VR No. A-16: 7/27/10; 9:33:30. AG Brief pg. 5. What Carlos actually testified to was that he did not know who Patrick Lewis was other than hearing about him and seeing him around the neighborhood. He never hung out with him, or did anything social with him. Id. The Attorney General further states that the alleged statement that Carlos did not know Patrick Lewis at all was refuted by Rashanda Dudley, citing to VR No. 14-2: 7/27/10; 5:41:05. Yet what Ms. Dudley testified to was that Carlos hung around with Rodriquez Turner (Hot Rod), not Patrick Lewis. Id.

## ARGUMENT

**1. Detective Wilson Gave Inadmissible Opinion Testimony and Improperly Expressed a Legal Conclusion that Carlos Was Guilty and Did Not Act in Self-Defense.**

**and**

**2. Det. Wilson's Testimony Regarding What Happens in the Typical Self-Defense Case Was Inadmissible Opinion Testimony.**[1]

[1] Because the Attorney General's arguments regarding Arguments 1 and 2 are intertwined, Carlos is responding to both Arguments under this one section herein.

The Commonwealth claims Det. Wilson's testimony regarding Carolos' self-defense claim was acceptable because it was "factual" (as opposed to opinion testimony or a legal conclusion regarding self-defense and guilt), because he was an expert, and because the burden shifts to the prosecution to prove a defendant was not privileged to act in self-defense. AG Brief pg. 13, 19, 28. These counter arguments are without merit because whether a defendant acted in self-defense is a question for the jury to decide no matter who bears the burden of proof.

**"Factual" testimony vs. opinion testimony and legal conclusion testimony regarding self-defense and guilt.**

Whether a defendant acted in self-defense is a question for the jury. West v. Commonwealth, 780 S.W.2d 600, 601(Ky. 1989). In order to determine whether a defendant acted in self-defense, a jury must take the facts of the case into account and determine the defendant's mental state, i.e., his or her culpability. Self-defense and imperfect self-defense are issues regarding a defendant's belief regarding the necessity of using force to protect against certain harms, the degree of force to be used, and whether these beliefs were wanton or reckless.[2] The Attorney General cites no authority for the

---

[2] Regarding self-defense, KRS 503.050, in pertinent part, states the following:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.
> ....
>
> (4) A person does not have a duty to retreat prior to the use of deadly physical force.

Regarding imperfect self-defense, pertinent to this case, KRE 503.120 states the following:

proposition that a police officer, or any witness for that matter, can testify as to whether he or she believes a defendant had the mental state necessary for the commission of an offense or the mental state necessary for a justification defense.

In this case, Det. Wilson's testimony clearly conveyed his belief or opinion that Carlos was not acting in self-defense. Regarding the prosecution's questioning of Det. Wilson in direct, the Attorney General says the prosecution "specifically instructed the witness to avoid an assessment of the validity of Ordway's claim by stating:

> You have a claim by this defendant... he was defending himself... now... and I don't want you to say whether it was a valid claim or not... that's the jury's decision- you have to- what I would like for you to do is tell the jury what you did, **what you found from the evidence that caused you to charge this defendant with intentional murder**."

AG Brief pg. 15. Despite the Attorney General's contention, this was nothing more than a backdoor way of asking Det. Wilson why he believed, or why it was his opinion, that Carlos was guilty of intentional murder and did not act in self-defense. This is evident from the prosecution's earlier questions: "[n]ow, were you, as an investigating officer, able... **in your opinion**, based on your experience as a um, homicide detective, were you able, in your own mind, [to] eliminate self-defense?" and "tell the jury if you will what you investigated and what you found that either supported or rebutted that [self-defense] claim by this defendant." VR No.A-15: 7/26:10; 2:32:12-2:32:28, 2:37:30-2:38:19.

The trial court did not rule that the prosecution could not elicit the answer sought by those questions. Rather, the trial court allowed the prosecution to elicit the answer

---

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but that the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

sought by rephrasing the questions and asking why Det. Wilson charged Carlos with intentional murder.[3] As stated in the Opening Brief, this was improper because "[t]he issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even through a route which is, at best, 'backdoor' in nature. Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982) (citing Kennedy v. Commonwealth, 77 Ky. (14 Bush) 340; Koester v. Commonwealth, 449 S.W.2d 213 (Ky. 1969); Deverell v. Commonwealth, 539 S.W.2d 301 (Ky. 1976)).

Regarding questioning a police officer as to why he charged a defendant with a particular crime, the Attorney General says "such testimony about whether charges were brought was proper and 'competent.' Tamme v. Commonwealth, 973 S.W.2d 13, 32 (Ky. 1998)." AG brief pg. 20. However, the Attorney General's statement grossly misrepresents what occurred in Tamme. The entire discussion on "testimony about whether charges were brought" in Tamme goes as follows:

> Appellant's counsel sought to elicit from Detective Knifley his opinion as to whether prosecution witness Jim Norvell (who had already testified) had committed certain criminal offenses, such as hindering prosecution or tampering with physical evidence. The trial judge sustained the prosecutor's objection and no avowal was offered to preserve the testimony. KRE 103(a)(2); Jones v. Commonwealth, Ky., 833 S.W.2d 839, 841 (1992). Regardless, a witness generally cannot testify to conclusions of law. Gibson v. Crawford, 259 Ky. 708, 722, 83 S.W.2d 1, 7 (1935). Defense counsel offered to "rephrase" the question and asked Knifley whether Norvell was charged with any criminal offenses as a result of his conduct. Knifley responded that Norvell was not charged. Thus, defense counsel elicited the only testimony Knifley was competent to render on this subject.[4]

---

[3] In response to each question, the trial court respectively ruled "but in, in... I think it needs to be asked in determinating [sic]... in determining because the police determine what to charge... the people with. They investigate crimes, so do it in that respect," and then "he can testify to why he charged him with intentional murder versus manslaughter or reckless homicide, and he does that by assessing what happened (inaudible) the evidence at the scene. Whether they chose to analyze evidence (inaudible) he's not making the ultimate call that he didn't use self-defense, he's saying why he didn't charge him with a lesser crime basically." VR No.A-15: 7/26:10; 2:32:28-2:33:50, 2:28:19-2:38:47.

[4] Norvell had previously testified that he was present when the victims in that case were killed, but did not actually see the killings. Norvell testified that he heard the shots, that Tamme told him he had just shot the two men, and that Appellant instructed him to dispose of one of the weapons. Id. It appears the point of

Id. Tamme actually supports Carlos' position that a police officer cannot give his opinion or a legal conclusion as to whether someone "committed certain criminal offenses" and stated that the only "competent" testimony on the subject is whether somebody was in fact charged with an offense. Id.

In the case at bar, Det. Wilson did more than simply recite "factual" information about whether Carlos was charged with an offense and what evidence he gathered during his investigation. As explained in the Opening Brief, he told the jury that he has investigated other cases and determined that self-defense was appropriate and not charged the person claiming self-defense in those cases. Id. at 2:38:55-2:46:18. This conveyed that he believed self-defense claims in other cases but did not believe Carlos' self-defense claim in this case.

Furthermore, Det. Wilson added his personal opinions and interpretations to the facts of this case. For example, regarding the two men Carlos said were robbing him, he testified "if you're going to attack someone, rob someone and assault someone you certainly do not want to be locked in by a seatbelt." Id. He testified "in a claim of self-defense there would indicate that there was a physical struggle... with three men and two handguns in a close quarters it's a, it's a fight for life and death at that point and there were no physical injuries whatsoever to Mr. Ordway and I found that extremely unusual in a fight with two other gentlemen where handguns are involved." Id. He further testified, with no legitimate foundation, that in a typical self-defense case the person who had to use lethal force does not leave the scene but, rather, puts his weapon down, calls the police, waits for the police to arrive, and cannot wait to tell his story to the police,

---

the attempted questioning was to elicit a reason Norvell would give testimony favorable to the prosecution. That is, that he gave his testimony in exchange for not being charged himself.

along with his testimony that Carlos did not do those things. Id. Again, Det. Wilson clearly expressed his opinion as well as a legal conclusion that Carlos was not acting in self-defense and was guilty.

**Testimony regarding "the typical self-defense case":**

One way in which Det. Wilson expressed his opinion that Carlos was not acting in self-defense and was guilty was by improperly expressing his other opinions about what happens in "the typical self-defense case" and telling the jury that Carlos' actions were not the same as those found in the typical self-defense case.

Carlos does not contend that no police officer can ever be an expert in certain fields. Rather, he contends that a police officer cannot be an expert in determining whether somebody actually acted in self-defense. To do so, an officer would have to have specialized training in psychology and law because an individual's beliefs and mental states are key elements when it comes to whether someone acted in self-defense under the law. Furthermore, if an officer were allowed to testify as such, nothing would preclude an officer from telling a jury he believed a defendant was guilty of intentional murder as opposed to wanton murder or reckless homicide in any other homicide case.

The Attorney General points out that some experienced police officers may testify as experts in certain areas in the field of narcotics trafficking. AG Brief pg. 30. While an expert in narcotics can testify as to what certain terms in narcotics trafficking mean and what instruments are used in narcotics trafficking Dixon v. Commonwealth, 149 S.W.3d 426, 430 (Ky. 2004), this is quite different from testimony about what individual's mental state or culpability was in a homicide case involving a self-defense claim. Which, again, is a question for the jury to determine. Similarly, an expert in accident reconstruction

never testifies regarding a driver's mental state or culpability. Rather, based upon math and physics, the expert testifies regarding the speed and placement of vehicles and other objectively measurable things. See Vires v. Commonwealth, 989 S.W.2d 946, 947-948 (Ky. 1999).

The one case the Attorney General cites in support of the proposition that a police officer can testify as an expert regarding self-defense is easily differentiated from the case at bar. In Thompson v. State, 169 P.3d 1198, 1207 (Ok. 2007), the defendant claimed another man shot at him in an apartment breezeway before he returned fire in self-defense. Id. at 1202 and 1207. The court found there was no error in allowing the detective to testify that there was no evidence that the victim shot at him. Id. at 1207. While not explained in the opinion, this testimony likely came in the form of asking the detective whether the victim had a gun on him, whether another bullet was found in the breezeway where the defendant claimed to be, and the like. The entire discussion of the issue reads as follows:

> In Proposition IV, Thompson claims that testimony by Homicide Detective Michael Zenoni constituted improper expert opinion testimony. During his testimony Zenoni was asked, in a number of different ways, whether his investigation revealed any evidence that supported Thompson's claim of self-defense, i.e., his claim that someone shot at him before he shot at anyone else. Zenoni repeatedly testified that he did not find any evidence to support this claim. When defense counsel objected to this inquiry, his objection was overruled. Thompson claims that Zenoni's testimony constituted improper expert opinion testimony, but the authorities cited do not support his claim. We conclude that Zenoni's testimony was proper. Proposition IV is rejected.

Id. (footnotes omitted).[5] There is no indication that the detective in Thompson offered opinion testimony as to what happens in the typical self-defense case.

[5] Regarding "the authorities cited," in a footnote the court states "See, e.g., Romano v. State, 1995 OK CR 74, ¶¶ 20–25, 909 P.2d 92, 109–10 (finding that expert blood spatter testimony that blood on certain

Even if Det. Wilson was an expert in the typical self-defense case and his testimony did not convey his opinion that Carlos was not acting in self-defense and was guilty, any probative value of testimony regarding what happens in the typical self-defense case was outweighed by the undue prejudice and misled jurors under KRE 403[6] because after hearing his such testimony, jurors would tend to disbelieve the truth of valid, yet atypical, self-defense claims.

**Burden of Proof:**

The Attorney General says this testimony was necessary because the burden shifts to the prosecution to prove a defendant was not privileged to act in self-defense. However, the issue is more complicated than the Attorney General lets on. Under KRS 500.070 (Burden of proof; defenses):

> (1) The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt, except as provided in subsection (3). **This provision, however, does not require disproof of any element that is entitled a "defense," as that term is used in this code, unless the evidence tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.**
>
> (2) No court can require notice of a defense prior to trial time.
>
> (3) The defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct.

(emphasis added). Under KRS 503.020 (Justification; a defense), "[i]n any prosecution for an offense, justification, as defined in this chapter, is a defense." In that chapter, KRS

---

clothing was consistent with wearer of clothing being person who stabbed victim was proper expert testimony, while subsequent testimony that, based upon expert witness's expertise, person who wore bloody clothing was not "a passive observer of [the] stabbing" had gone too far and was inappropriate)."

[6] KRE 403 states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

503.050 states the elements of self-defense (stated supra at pg. 2). The Commentary to KRS 503.020 states:

> The availability of this privilege as a defense to a criminal charge is dependent under prevailing law **upon a showing that**: the defendant believed physical force to be necessary for self-protection against an unlawful attack; his belief was based upon reasonable grounds; the force used was believed necessary to avoid imminent danger; and the force used was not in excess of that believed necessary to repel the unlawful attack. Only one major change of direction in this doctrine is accomplished by KRS 503.050. No longer is availability of the privilege dependent upon a showing that a defendant's belief in the necessity of his actions is reasonable.

In any event, the burden of proof is irrelevant because, as explained above, whether a defendant acted in self-defense is a question for the jury. Just because self-defense is asserted, the prosecution cannot present a witness to essentially testify that he believes the defendant did not act in self-defense. This would be analogous to permitting the prosecution in a normal homicide case in which a culpability level must be proven to testify that he believes the defendant's act of killing was intentional as opposed to wanton or reckless or committed under extreme emotional disturbance. That is, even if the prosecution is required to prove certain elements of an offense, such does not mean the prosecution can simply put a witness on the stand to offer his opinion that a defendant committed those elements, especially when they regard a defendant's mental state.

**Preservation:**

These issues are adequately preserved because the defense specifically objected that the questions asked called for Det. Wilson to answer an issue to be decided by the jury, that Det. Wilson was arguing "why one thing supports self-defense and another

thing doesn't," and that he was giving opinion testimony.[7] The objections all occurred between 2:32:28-2:46:18 on VR No.A-15: 7/26:10.[8]

When the prosecution explicitly asked for Det. Wilson's opinion regarding Carlos' self-defense claim the defense objected that the prosecution was asking about an issue to be determined by the jury and the prosecution argued that Det. Wilson was an expert. Id. at 2:32:28-2:33:50. The defense responded "[h]e's asking about an ultimate issue, he's asking about an issue that isn't based on not his experience, but...." Id. The trial court interrupted and said the question needed to be asked because the police determine what to charge people with. Id.

When the prosecution then asked if Det. Wilson found evidence that supported or rebutted the self-defense claim, the defense objected saying it was an ultimate issue question and that Det. Wilson "can talk about the evidence he found, Mr. Larson can argue, and the jury makes a decision" and argued Det. Wilson "can't sit there and argue about why one thing supports self-defense and another thing doesn't." Id. at 2:37:30-2:38:19. The trial court ruled Det. Wilson could say why he didn't charge him with a lesser crime. Id. at 2:38:19-2:38:47. During the testimony, the defense continually objected. Id. at 2:38:55-2:46:18. When the defense was allowed to approach, the defense objected that Det. Wilson was giving his subjective opinion and was now commenting on

---

[7] Even if inartfully stated, See Burton v. Commonwealth, 300 S.W.3d 126, 139 (2009): "Thus, '[w]hile the objections were not sharply to the point we think they adequately alerted the trial judge to the proposition.' Hardin v. Commonwealth, 428 S.W.2d 224, 226 (Ky.1968). That being said, even '[a] general objection is sufficient if the evidence is not competent for any purpose.' Ross v. Commonwealth, 577 S.W.2d 6, 13 (Ky.App.1978)."

[8] In the Opening Brief, undersigned counsel inadvertently failed to list each specific time cite to the record when stating that Argument 2 was preserved. Again, all objections occurred between 2:32:28-2:46:18 on VR No.A-15: 7/26:10 and the specific times are listed in the paragraphs following this footnote's number insert.

Carlos' right to remain silent and giving his subjective opinion as well as eliciting habit and routine evidence. Id.

If this Court does finds any issues or aspects of issues raised inadequately preserved, Carlos still asks this Court to reverse because "minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed." Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1990). This is especially true when considering an "officer's testimony often carries a special aura of reliability." State v. King, 219 P.3d 642, 646 (Wash. 2009) (quoting State v. Kirkman, 155 P.3d 125 (Wash. 1997)).

**3. Improper Comments on Carlos' Post-Arrest Silence.**

The Attorney General sets up a straw man regarding Carlos' argument by stating that Carlos was not silent, the Miranda issue is unpreserved, and it was evidence of flight. First, Carlos is not complaining of the comments made prior to invoking his right to silence prior to being arrested. Second, Carlos does not raise a Miranda issue, he simply pointed out that whether Miranda warnings were given prior to invoking his right to silence after being arrested is irrelevant. Third, invoking your right to silence after being arrested is in no way evidence of flight.

The actual issue is straight forward. Det. Wilson testified that after Carlos was arrested, he attempted to interview him and Carlos said "I got fucking nothing for you." Id. at 2:05:17. Later, Det. Wilson testified that typical people who act in self-defense "cooperate with the police fully… [t]hey can't wait to get their story out." Id. at 2:42:55-2:46:18. The defense objected, stating this was an improper comment on silence, and requested a mistrial, and the court overruled the request. Id.

Comments on post-arrest silence constituting reversible error occur when,

> ...post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.

Hunt v. Commonwealth, 304 S.W.3d 15, 36 (Ky. 2009) emphasis added (citing Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky.1983) That is exactly what happened in this case. The prosecution used this as evidence that Carlos was not acting in self-defense because he did not do what Det. Wilson claimed people typically do when acting in self-defense, which is fully cooperate with police and tell their story.

**4. Precluding Carlos From Telling Jurors What Lee Lee And Hot Rod Said When He Testified They Were Robbing Him Denied Him A Meaningful Opportunity To Present A Complete Defense.**

Carlos reasserts his argument from his Opening Brief; that is, Carlos telling the jury what Hot Rod and Lee Lee said to him when they tried to rob him would not have constituted inadmissible hearsay because it would not have been offered for the truth of the matter asserted, even if hearsay it fell under exceptions to the hearsay rule, and the testimony was necessary to his right to present a defense. The Attorney General offers no counter arguments.

Rather, the Attorney General simply says no error occurred based on its erroneous assertion that Dillard v. Commonwealth, 995 S.W.2d 366, 372 (Ky. 1999) "rejected an argument identical to the one made [in the Opening Brief]." AG Brief pg. 43. Contrary to the Attorney General's assertion, Dillard was in no way similar or identical to this case. Dillard did not even testify in that case. Rather, an audio recording of Dillard's confession was played for the jury and the name of the codefendant Dillard said was the

true killer was redacted because such was required under the Confrontation Clause of the U.S. Const. Amend. 6 and Section 11 of the Ky. Const. Dillard, 995 S.W.2d at 371-372. Dillard in no way allowed for the limiting of a defendant's testimony.

The Attorney General also cites to Mills v. Commonwealth, 996 S.W.2d 473, 489 (Ky. 2010). However, in Mills, this Court concluded that not permitting witnesses other than the defendant from presenting inadmissible hearsay testimony was not error. (Again, in the case at bar, Carlos' testimony would not have been inadmissible hearsay). In Mills, the defendant did not even argue that the trial court's rulings were incorrect on appeal. Id. The Attorney General's contention that Dilard and Mills rejected an argument similar to the one at bar is also simply wrong.

By precluding Carlos from so testifying, and making him offer a sanitized version of events, the jury was unable to consider Carlos' version of events and why he believed he needed to defend himself. Simply being allowed to say "I was scared" does not convey to jurors the fear one could feel in the same way as being told the actual words an assailant used does. This was a clear violation of the rules of evidence and the right to present a defense and cannot be proved harmless beyond a reasonable doubt as explained in the Opening Brief.

**5. Denial of Defense Challenges For Cause.**

Juror 5091- Sister of Victim's Advocate on this case. The Attorney General's reliance on Cochran v. Commonwealth, 114 S.W.3d 837 (Ky. 2003), is misplaced. In Cochran, this Court held no error where the trial court refused to excuse for cause a juror who had worked with the Commonwealth Attorney's office in the past. That juror had been a victim in a case that the Commonwealth Attorney presented to the Grand Jury. That juror

worked with the victim's advocate. Id., 840. That situation is not the same as that in the case at bar where the victim's advocate is the sister of the prospective juror in question. In the instant case, said victim's advocate was working with the victims' families in this high profile capital case.

Contrary to the Attorney General's position, there is no litmus test that a prospective juror need only be excused for cause if he or she is related to "a testifying witness or the prosecutor himself." AG Brief pg. 49. Indeed, this Court has made clear that the determination of whether a juror should be excused for cause is a fluid one. Impartiality is a state of mind. Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007). Here, the trial judge was confronted with a situation where the prospective juror was a blood relative of the victim's advocate who was actively working with the victims' survivors. It is not just, as Attorney General implies, the fact of a blood relationship between this juror and a member of the Commonwealth Attorney's staff; it is that relationship plus the staff member's work on the case at bar. The implied bias from this "transgresses the concept of a fair and impartial jury." Sholler v. Commonwealth, 969 S.W.2d 706, 709 (Ky. 1998).

One final point must be made. The Attorney General argues that since both the prosecution and the defense used peremptory strikes on this juror, there is no prejudice. AG Brief pg. 57. This argument should be rejected—Carlos still used one of his strikes on Juror 5091. He was denied the use of this strike because the court refused to remove her for cause. The prosecution's action in also using a strike on this juror is irrelevant. Carlos was denied a strike that he was entitled to because the court refused to remove this juror for cause.

Juror 5303- Could Not Consider Mitigating Circumstances. First, the Attorney General states that Juror 5303 was confused about mitigation—she "thought that duress was a mitigating circumstance." AG Brief pg. 53. Duress **is** a mitigating circumstance. KRS 532.025(2)(b)(6). The Attorney General then states that this juror "was not informed of various statutory mitigators," but then concedes she admitted she "did not consider age or mental impairment a mitigating circumstance." AG Brief pg. 53. As noted in the Original Brief, this juror **was** told that age of a defendant was a mitigating factor, and was also asked about mental impairment as a mitigating factor. Juror 5303 said that she would not consider those to be mitigating. VR No. 5: 7/14/10; 12:09:30-12:11:30. Age and mental impairment are statutory mitigating circumstances. KRS 532.025(2)(b)(2), (7), (8). It is a fundamental principle that a juror in a capital case must be able to give effect to mitigators. Grooms v. Commonwealth, 756 S.W.2d 131, 134-138 (Ky. 1988).

The Attorney General's Argument on Preservation and Shane. The Attorney General's argument that Shane, supra, is inapplicable since this was a death penalty case and both sides received more strikes than required by RCr 9.40 should be rejected. The Attorney General fails to cite to any cases that stand for the proposition that a defendant gives up his right to an impartial jury as guaranteed by Sec. 11, Ky. Const. and the 6th and 14th Ams., U.S. Const. by receiving more preemptory strikes than prescribed by RCr 9.40.

The Attorney General also argues that Carlos did not "perfect" his Shane argument because he did not actually write the additional jurors he would have struck on the strike sheets, but instead "they were handwritten on a fill-in-the-blank motion, tendered after the jury's composition was known." AG Brief pg. 57. It is accurate that the additional jurors were put on a separate form, not the strike sheets, but counsel stated

that it was filing the document containing the additional jurors' numbers immediately after the jury was announced. As this documentation is done in open court, it is hard to imagine that notations would not be handwritten. VR No. A-10: 7/20/10; 9:47:03.

Finally, Carlos conceded in his Original Brief that what was noted was that if a motion to strike had been granted on Jurors 5303 and 5132, he would have used peremptory challenges on Jurors 5464 or 5531 (jurors who did sentence Carlos to death). TR 3, 369-370; TR 4, 577. While Carlos should technically not have tied the jurors he would have removed to certain strikes, he asks this Court, if it should decide that a juror other than 5303 or 5132 should have been removed for cause, to hold that it would have used the denied challenges on the two jurors he did identify.

**6. Improper Excusal of Juror 5513.**

The Attorney General argues that because this juror harbored "racial bias" her removal was appropriate. AG Brief pg. 58-59. The juror was African-American, as was the defendant and the two victims. There was no racial bias underlying Juror 5513's responses, just the fact that she was aware of certain alleged injustices in the court system and would be cognizant of that fact when determining Carlos' guilt. VR No. B-7: 7/15/10; 2:45:45-2:47:15. The fact that race would cause her to take duties seriously should not have resulted in her removal for cause.

**9. Improper Limits Placed On Individual Voir Dire.**

Defense Limited in Exploration of the Treatment of African-Americans in the Justice System: The prosecution cannot have it both ways. Juror 5513 was removed for cause on the prosecution's motion after it questioned her about the role race would play if the defendant was Caucasian. That juror—an African-American—indicated that race would

be something that she would consider in this case, but hesitated when asked if she would consider race if the defendant were Caucasian. VR No. B-7: 7/15/10; 2:50:00.

The Attorney General argues that there is no authority to allow an African-American defendant to question jurors about race when the victims are also African-American. AG Brief pg. 68. That cannot be true. Indeed in the case at bar, one Caucasian juror—5539—was removed because of the court's concerns that she would not value the lives of the victims as much as they were African-American. Id., 11:10:45.

Indeed that juror, 5539, in response to the prosecutor's questions about the role race would have in her decision making, stated none that she could think of. Id., 10:55:34. It was only upon the defense's further probing that her concerns about the way African-Americans value life was ferreted out. Id., 11:04:14. All the defense wanted to do in reference to Juror 5531 was further delve into his answer that he had never witnessed racism despite the fact that he was friends with many African-Americans. Id., 10:33:24. It should have been allowed to do so. It must be noted that 5531 ultimately sentenced Carlos to death. TR 4, 532.

**10. Jurors Told They Would Be Charged With Weighing Aggravators and Mitigators.**

The problem with this information is that it implies that if the aggravating circumstances outweigh mitigating circumstances a death sentence must be given. Yet jurors could find absolutely no mitigating circumstances whatsoever and find the presence of an aggravator, and still give life. Because Kentucky is a non-weighing state, a jury can reject a death sentence for any, or no, reason. Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990).

**12. Brady Violation Concerning Voice Recorder Found in the Kia Optima.**

Regarding whether or not there is a sound of a gun cocking on the voice recorder, trial counsel believed it sounded like that. That was one of the reasons counsel argued they needed to know about the contents of the voice recorder prior to trial—so they could have an expert analyze the tape and pinpoint if the sound was actually that of a gun cocking. VR No. A-14-2: 7/26/10; 3:54:48.

The crux of the Attorney General's argument is that the defense should have gotten batteries, taken them to the evidence locker, and played the voice recorder themselves. Yet defense counsel put on the record that in Fayette County, it could not have gone to the evidence locker without a prosecutor. Id., 3:59:20. Thus, this case is distinguishable from Bowling v. Commonwealth, 80 S.W.3d 405, 410 (Ky. 2002), cited by the Attorney General, because the defense could not "without the Commonwealth's assistance or permission" have listened to the voice recorder. The defense in Bowling could have obtained a transcript of the federal sentencing hearing of Chappell without the prosecutor. Furthermore, in the case at bar, the prosecutor told the defense there was nothing on the voice recorder. Why would the defense have even attempted to listen to the voice recorder? Id., 3:51:40.

Furthermore, the Attorney General argues no harm, no foul because the defense played the voice recorder for the jury at trial. AG Brief pg. 80. Yet merely playing the voice recorder, unenhanced and pretty much inaudible, was not enough. As the defense argued in its motion for a mistrial, it really needed to have the recorder analyzed before making the decision to play it for the jury. Hopefully an expert could rule out Carlos as a speaker and pinpoint when the recording was made. Id., 3:57:00. Lack of disclosure did undermine confidence in the outcome of this case because playing the recorder without

any prior analysis, and with Det. Wilson on the stand opining it had no evidentiary value whatsoever, was tantamount to not playing the recorder at all. Id., 4:32:00-4:34:00.

**14. Evidence of "Carjackings" Should Not Have Been Admitted.**

The problem here is that the two separate purported crimes of carjacking were used by the prosecution to establish that Carlos was acting intentionally in shooting Hot Rod and Lee Lee in that he was allegedly fleeing from the scene. Yet proof of Carlos' guilt of carjacking was never established beyond a reasonable doubt. The prosecution could have adduced testimony about where Carlos was located after the wreck without injecting testimony about these two uncharged offenses into the case.

**15. Rental of Room at Home Suites Should Have Been Excluded.**

Carlos is not, as the Attorney General states, arguing a different objection on appeal. Carlos' primary argument on appeal is that this evidence is irrelevant, as was his argument at trial. Indeed when the motion was argued before the court prior to trial, the prosecutor stated the evidence was relevant because its theory was that the men were traveling from the hotel room to a relative's home in the Appian Way area when the shootings occurred. This was the basis for the trial court's ruling that the evidence could come in at trial. VR No. A-9: 7/19/10; 2:48:20. At the time, the defense noted that the prosecution theory was not based in reality because the Kia Optima the men were traveling in was not rented—in Louisville—until August 10, the room was rented on August 6, and the crime occurred on August 11. Id., 2:49:45. And the defense was proven correct at trial as Louisvillian Rashanda Dudley, the person who rented the Kia, testified the rental car was taken by Hot Rod while she was sleeping. VR No. 14-2:

7/26/10; 5:42:50-5:43:18. She found out about the shootings in Lexington the next day. Id., 5:44:00. 5:45:22.

As far as a "different objection" now on appeal—that the testimony about Home Suites "forced Carlos to talk about his drug usage and sales," AG Brief pg. 90—Carlos was not making a different objection when he mentioned this, but was discussing why the admission of this evidence was not harmless. Original Brief pg. 89. Because the evidence that a hotel room was rented on August 6—five days before the shooting—was admitted at trial, Carlos was forced to defend that action when it had nothing to do with what happened on August 11. It injected another issue into the case.

The Attorney General argues that this testimony was necessary to explain why the two men were at Appian Way on the night of August 11. Appellee's Brief, 90. How does renting a hotel room on August 6—and it must be pointed out the hotel room was not on Appian Way but on Richmond Road, VR No. A-11: 7/21/10; 9:45:09—explain why the men were on Appian Way on August 11? Testimony that explained why the men were on Appian Way was unnecessary. In addition, if any testimony did provide an explanation for that, it came in from Kevin Turner, Hot Rod's cousin, who said that he lived on Appian Circle. Id., 9:25:50. Furthermore, the prosecutor himself stated in closing argument that it believed that the men left Louisville at around 10:00 p.m. on August 11 in the rented Optima, and the shootings occurred in Lexington shortly thereafter. VR No. A-17: 7/28/10; 11:44:00.

The Attorney General states this was "background evidence" necessary to the prosecution's case. This case is not like Downing v. Commonwealth, 2005 WL 1412448 (Ky. 2005) (unpublished), cited by the Attorney General in its brief. There, the evidence

of the child victim's poverty was offered to explain why she would get into the car of a complete stranger when promised candy and soda. Nor is this, as argued by the Attorney General, background evidence of a decedent's interests or hobbies to show he or she is not just a statistic. AG Brief pg. 91-92. This was evidence that was completely unnecessary, and the introduction merely served to confuse the jury. The three men were driving in a car in Lexington, and they wrecked. There was no reason to explain why the men were in Lexington or on Appian Way. There is nothing unique or odd about the fact that these three men were driving on Appian Way, as this is a free country.

**17. Missing evidence.**

The Attorney General states, without citation to the video record, that the medical examiner testified she found the white rocks on Lee Lee during the autopsy and "[s]she testified that she placed the white rocks, with paperwork, in a refrigerator for retrieval by a lab technician for testing." AG Brief pg. 102. This matters because the lab tech said she retrieved the white rocks from the refrigerator. VR No. A-11: 7/21/10; 1:16:40. In actuality, Dr. Rolf merely testified that she submitted the white rocks "to toxicology." VR No. A-14-1: 7/22/10; 4:34:00. There was a gap in the chain of custody.

**18. Failure to Give Requested Multiple Assailant Self-Protection Instruction.**

The Attorney General admits that Carlos tendered a jury instruction referencing the fact that Lee Lee and Hot Rod were acting in concert, yet still argues this issue is unpreserved. Carlos disagrees. This Court stated in Pollini v. Commonwealth, 172 S.W.3d 418, 428 (Ky. 2005) (quoting from RCr 9.54(2) and from Grooms v. Commonwealth, 756 S.W.2d 131 (Ky.1988)):

> For adequate preservation of exceptions to jury instructions, the Kentucky Rules of Criminal Procedure [RCr 9.54] require evidence on the record of

> either (1) a specific objection or (2) the tendering of an instruction in ... a manner which presents the party's position 'fairly and adequately' to the trial judge.... 'In many cases, ... counsel submit a raft of tendered instructions, any one of which may be overlooked by the trial court. The failure to instruct upon a matter which would have been surely instructed upon if the oversight had been called to the attention of the court by counsel is not error.'

Here, Carlos only tendered two instructions to the trial court: (1) self-protection utilizing "acting in concert" language and (2) missing evidence.

Appellant apologizes if one of the citations to the video record where the self-protection instruction was discussed was inaccurate. However, that was at only one point in the argument on this issue, i.e. Original Brief, 101, only video citation "VR No. A-16: 7/27/10; 3:43:30" is incorrect. Later in the argument in the Original Brief, 102, Carlos has a correct citation—"VR No. A-16: 7/27/10; 3:21:36, 3:30:22"—to the portion of the record where the self-protection instruction tendered by the defense is discussed. Thus, Carlos does not understand how the Attorney General "was unable to locate any discussion about this proposed tendered instruction," AG Brief pg. 103, since Carlos did include a citation to a portion of the video record where the tendered instruction was debated. For this Court's reference, as well as the Attorney General's, the entire discussion can be found at VR No. A-16: 7/27/10; 3:20:00-3:32:45.

The Attorney General's reading of Hayes v. Commonwealth, 870 S.W.2d 786 (Ky. 1993), is too narrow. Hayes is not limited to the situation where "the defendant kills someone that was not one of the original aggressors, but was in a group of people with the aggressors." AG Brief pg. 104. Indeed, this Court in Hayes stated the instruction should be given when there are "multiple aggressors acting in concert." Id., 789.

It was important for the defense tendered instruction to be given. This case was not just that if the jury believed Carlos' "tale of robbery," they had to acquit. AG Brief pg. 105. This was not just an all or nothing case. If the jury had been instructed to consider Carlos' belief in the need to use deadly force to protect himself from a concerted attack by two men at once, as opposed to separately considering each man's actions, the jury could have found deadly force was necessary because he was outnumbered. It is easier to believe that less than deadly force was needed if Carlos was fighting off one man as opposed to two men acting together. Furthermore, a jury would have been more likely to believe Carlos thought he needed to act in self-defense but his belief was wanton or reckless.

**21. Prior Juvenile Adjudications Should Not Have Been Admitted Due To The Prosecution's Failure To Disclose Them In A Timely Manner.**

The Attorney General seems to concede this violation. Carlos reasserts his argument from his Opening Brief. Again, this violation undermines confidence in the outcome and it cannot be proven that erroneous introduction of the prior juvenile adjudications is not what swayed jurors to impose the death penalty in this case.

**22. The Prosecutor Exceeded the Scope of KRS 532.055 When Telling Jurors About Carlos' Prior Convictions.**

The prosecution fails to acknowledge Mullikan v. Commonwealth, 341 S.W.3d 99, 109 (Ky. 2011), which states "evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." Again, in this case evidence of prior convictions was not limited to the elements as required. Also, the prosecution telling a witness, and jurors, that Carlos owed $34,461.83 in unpaid child support with no

evidence of a conviction for that alleged offense was improper "rebuttal" and clearly violated KRS 532.055 and Mullikan.

**23. Prosecution's Introduction of Irrelevant, Highly Prejudicial Evidence of Malingering and Purported Lack of Mental Illness Under The Guise Of Rebuttal In The Penalty Phase.**

The defense penalty phase case, the prosecution said it did not think the defense put on enough evidence of a mental health issue for it to call a rebuttal witness. VR No.A-18: 7/29/10; 3:16:15-3:17:20. Less than a minute later, the prosecution called Dr. Simon (psychology director at KCPC) as a rebuttal witness. Id. at 3:18:14. Defense counsel objected to Dr. Simon's testimony and argued that they did not enter any significant evidence of mental health issues. Id. at 3:23:22-3:25:11. Defense counsel argued while it may have been enough for an instruction, such is not enough to rise to the level of a defense and thus was not enough evidence for rebuttal. Id.

**24. Non-unanimous Mitigators. AND 25. Penalty Phase Instructions Denied Reliable Capital Sentencing.**

In December, 2011, the American Bar Association (hereinafter ABA) released "The Kentucky Death Penalty Assessment Report."[9] In Chapter 10, Capital Jury Instructions, the ABA noted that capital jurors in the Commonwealth are not always given adequate guidance in their decision whether a defendant should live or die.[10]

> 15.6% of interviewed Kentucky capital jurors failed to understand that aggravating circumstances needed to be found beyond a reasonable doubt. Moreover, high percentages of these jurors misunderstood the guidelines for considering mitigating evidence. In particular, 45.9% of these jurors 'failed to understand . . . that they [could] consider any mitigating evidence' while 61.8% of these jurors 'incorrectly thought [that] they had to be convinced beyond a reasonable doubt on findings of mitigation.' Finally, 83.5% of these jurors 'failed to realize [that] they did not have to

[9] http://www.abanow.org/2011/12/kentucky-legal-team-identifies-problems-with-commonwealths-death-penalty-system-calls-for-moratorium-on-executions/

[10] Chapter 10 of the ABA report is included in the Appendix to this Reply Brief.

> be unanimous on findings of mitigation,' despite the U.S Supreme Court's decision in Mills v. Maryland [486 U.S. 367 (1988)] that held that such unanimity is not required.

Citing William J. Bowers & Wanda D. Foglia, Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing, 39 CRIM. L. BULL. 51, note 2, at 68, 71 (2003).

One of the recommendations for Kentucky is to revise jury instructions given in capital cases. ABA Report, 308. The ABA recommends that jury instructions include some of the language requested by Carlos in his Original Brief including that the jury be told that (1) what mitigation means, and that the finding of mitigating circumstances does not have to be unanimous as to the jury and is not subject to the beyond the reasonable doubt standard, ABA Report 311, 314-315; (2) a non-death verdict is possible even if aggravators found but no mitigators found, Id. at 315-316; and (3) parole and consequences of verdict, Id. at 311-314. Carlos strongly urges this Court, in light of the ABA report, to reconsider these issues.

**28. Carlos' Death Sentence is Arbitrary and Disproportionate. AND 29. Denial of Access to Data and Improper Method of Proportionality Review.**

Carlos would direct this Court's attention to Chapter 7 of the ABA Report,[11] in which it was recommended that this Court establish a statewide data collection system on all death-eligible cases and broaden its method of proportionality to include cases in which the death penalty was not imposed. In light of the Report, Carlos strongly urges this Court to reconsider this issue and to follow any other recommendation in the Report.

Respectfully Submitted,

Emily Holt Rhorer  Brandon Neil Jewell

[11] Chapter 7 of the ABA Report is also included in the Appendix to this Reply Brief.