No. 21-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2021

DAVID WAYNE DOOLEY
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Due Process violated when a criminal defendant must bear the burden of showing bad faith in order to be entitled to a missing evidence instruction, following *Arizona v. Youngblood*, 488 U.S. 51 (1988), where a similarly situated civil movant would not?
2. Is Due Process violated when willful state action or collusion results in a violation of the doctrine of separation of witnesses and curtails the defendant's right to effective confrontation and fundamental fairness?

LIST OF PARTIES

Petitioner is Mr. David Wayne Dooley. Counsel for Mr. Dooley Hon. Erin Hoffman Yang and Jared Travis Bewley Assistant Public Advocates, Department of Public Advocacy, 5 Mill Creek Park, Suite 100, Frankfort, Kentucky 40601.

Respondent is the Commonwealth of Kentucky, represented by Hon. Leilani K.M. Martin, Assistant Attorney General, and to Hon. Daniel Cameron, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000, (502) 696-5342, Counsel for Respondent.

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APPENDIX

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OPINION BELOW

The published decision of the Kentucky Supreme Court in *Dooley v. Commonwealth*, 626 S.W.3d 487, 2021 WL 1744453 (Ky. Feb. 18, 2021) is attached at A2-A27.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final decision of the Kentucky Supreme Court on a matter of federal law, such as the question of federal due process rights. The state court decision in this case applied federal due process principles in affirming the trial court's allowance of a witness' testimony after state actors willfully violated a separation order, and explicitly applied federal due process standards in affirming the denial of a missing evidence instruction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part, "No State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

Kentucky, like twenty-one other states, applies *Youngblood*'s bad faith standard to cases of missing *potentially* exculpatory evidence and *Trombetta*'s two-part test to cases of missing *apparently* exculpatory evidence. *Commonwealth v. Parrish*, 471 S.W.3d 694, 697 (Ky. 2015); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); *California v. Trombetta*, 467 U.S. 479, 489 (1984). The Commonwealth has

applied *Youngblood* since 1997, when the Kentucky Supreme Court held that Section 2 of the Kentucky Constitution provides no greater due process protections than those conferred by the Fourteenth Amendment to the United States Constitution. *Collins v. Commonwealth*, 951 S.W.2d 569, 572 (Ky. 1997).

Petitioner David Dooley was convicted of the murder of Michelle Mockbee and of tampering with physical evidence on April 11, 2019.[1] He received a combined sentence of forty-three years imprisonment. Dooley had previously been convicted for the same murder, though that conviction was vacated on May 12, 2017, after a post-conviction motion pursuant to Kentucky Rule of Criminal Procedure 60.02. The motion was granted in part due to the revelation that the Boone County Sheriff's Department had withheld relevant video evidence of an unknown third party near the scene of the murder close to the time it occurred, as well as the discovery that Commonwealth's Attorney Linda Tally Smith had been engaged in a secret affair with Detective Bruce McVay—the lead investigator in the case—at the time of Dooley's first trial.

The Murder of Michelle Mockbee

On May 29, 2012, Michelle Mockbee arrived to work at Thermo Fisher Scientific (TFS) between 5:50 and 6:05 a.m. in order to submit payroll to the medical supply warehouse's corporate headquarters. Around the time Michelle arrived, there were eight other TFS employees on site, including Dooley. Inventory Control manager Ed Yuska noticed that Michelle was not in her office, as expected,

[1] TR vol. 7 p. 726.

close to 7:00 a.m. Shortly thereafter, maintenance manager Joe Hibner found a large bloodstain outside the women's bathroom and brought it up to Yuska. No one had reported being injured and Dooley—part of the custodial staff—informed Yuska that the bloodstain had not been there when he arrived at TFS earlier in the morning. Dooley and Yuska began searching the area around the bloodstain, eventually proceeding to the nearby mezzanine. There, Dooley and Yuska discovered Michelle Mockbee lying in a large pool of blood—feet and hands bound-- with a bag placed over her head.

Officers of the Boone County Sheriffs Office arrived at TFS and began their investigation into Michelle's murder. All TFS employees present—including Dooley—consented to give interviews, a DNA sample, a shoe print, and to allow police to search their vehicles. Dooley was interviewed by Detective Bruce McVay and became a suspect when McVay and the other officers learned that Dooley had left TFS that morning before returning a short time later. Officers later claimed that Dooley did not mention his brief absence during the interview. McVay—who was notorious in the Boone County office for intentionally turning off his recording devices while interviewing suspects—claimed that his tape recorder had malfunctioned during Dooley's interview.

Michelle's autopsy revealed that she had suffered blunt force injuries to the back right side of her head, as well as several lacerations and a broken arm. Boone County officers recovered most of the bag covering Michelle's head, yet they left one portion of the bag behind at the scene. Though the Commonwealth theorized that

Michelle had been beaten to death with a tape gun, no murder weapon was ever recovered. At trial, defense expert Rodger Howell—a professor of biomechanical engineering and osteopathic medicine—testified that a tape gun could not exert the force necessary to inflict Michelle's injuries or cause her death. The police's inability to find and recover a murder weapon and other relevant evidence became the basis for Dooley's tampering with physical evidence charge.

David Dooley's Second Murder Trial

Following the vacation of Dooley's initial sentence, he was retried in the Boone County Circuit Court. In the second trial, the previously suppressed video of an unknown third person at TFS near the time of the murder was presented, and Linda Tally Smith was replaced as prosecutor by special prosecutors. DNA recovered from the tape used to restrain Michelle excluded Dooley as a contributor. DNA from the preserved portions of the bag over Michelle's head did not exclude Dooley as a contributor, though the same result would be expected with one in every 160 white men. Though the unpreserved portion of the bag was described by officers as "bloody," they baselessly claimed it lacked any evidentiary value. At the conclusion of the guilt phase of the trial, defense counsel proposed a jury instruction on the missing evidence, which read:

> If you believe from the evidence that there existed the bottom of the bag found around Michelle Mockbee's head which was not tested for DNA and that agents or employees of the Commonwealth intentionally destroyed it, you may, but are not required to, infer that the bottom of the bag found around Michelle Mockbee's head which was not tested for DNA would be, if available, adverse to the Commonwealth and favorable to the Defendant.[2]

[2] TR vol. 7 p. 725; VR 3/12/2019; 11:24:07-11:24:18.

The adverse inference instruction was not submitted to the jury.

The prosecution, lacking any direct physical evidence, attempted to paint Dooley as motivated by Michelle's possible discovery of time card fraud committed by Dooley and his wife—who also worked at TFS as custodial staff. The Commonwealth claimed that the Dooleys would clock each other in at TFS when only one was cleaning, so they could receive their daily flat rate as well as double their hourly rate. Though there was no evidence that Michelle had discovered their ruse, the Commonwealth speculated that either (1) Michelle had confronted Dooley and he had impulsively murdered her on the spot, or (2) Dooley knew Michelle had found he and his wife out and Dooley had carefully composed a plan to murder her, using his custodial resources and experience to cleanse any physical evidence linking him to the killing.

The defense's case consisted largely of raising the possibility of alternate perpetrators—including Michelle's husband Dan and Mockbee family friend and coworker Chris Black. Dan Mockbee was a shipping supervisor at TFS and had keys to most doors around the building. Though Dan typically arrived around 9:00 a.m., he did not come to work on the day of Michelle's murder. At the time of Michelle's murder, the couple was roughly $70,000 in debt, though Dan claimed he was unaware of this, and police inspection of Dan and Michelle's laptops showed that both had accessed online dating sites. Dan Mockbee also claimed to be unaware that he had recently liquidated $15,000 from his 401k, that Michelle had similarly liquidated some of her retirement account, that Michelle had been making

payments to a debt consolidation service, and that Michelle's wages were about to be garnished by Target as a result of a civil suit.

Following Michelle's death, Dan Mockbee received a total of $777,575.05 from various life insurance policies. By the time of Dooley's second trial, Dan had spent more than $400,000 of the life insurance proceeds, often withdrawing thousands of dollars in cash from different bank branches on the same day. As of 2019, Dan had not used any of that money to buy a headstone for Michelle. Less than five months after the murder, however, Dan Mockbee had written Chris Black a check for $10,000. Dan had approved Black's taking the day of Michelle's murder off from work.[3] During his testimony, Dan could not recall why he had written Chris the check.

After Dan Mockbee had testified, Boone County detectives went to serve a subpoena on Chris Black. The detectives took the opportunity to tell Black he been accused of taking $10,000 from Dan as payment for him to murder Michelle Mockbee. Immediately after taking the stand at trial and being sworn, Chris Black began denying that he had taken the money to kill Michelle. Defense counsel quickly objected on the grounds that state actors had violated the witness separation order and had caused Black to tailor his testimony in a way that imperiled the defense's ability to present a defense and effectively cross-examine Black. The trial court overruled the defense's motion to exclude Chris Black and his

[3] *Id.* at 2:26:00.

wife from testifying and Chris Black's testimony was allowed in full with no jury admonition or later instruction.

The jury found David Dooley guilty of murder and tampering with physical evidence.

David Dooley's Appeal

David Dooley appealed to the Kentucky Supreme Court, raising several claims of error, including (1) that evidence of Dooley's time fraud was erroneously admitted and (2) that the trial court improperly admitted cumulative evidence. *Dooley v. Commonwealth*, 626 SW3d 487, 491 2021 WL 1744453, 1 (Ky. 2021). Dooley also raised the same arguments presented here: (3) that the trial court improperly allowed Chris Black's testimony over the defense's objection and (4) that the trial court improperly withheld a missing evidence instruction. *Id.* All issues were preserved for appeal at trial. *Id.* at 492.

The Kentucky Supreme Court did not find reversible error in either the denial of the motion to exclude Black's testimony or the withholding of a missing evidence instruction. *Dooley*, at 502. The Court was troubled by state actors muddling the clarity and authenticity of a state's witness in a largely circumstantial case. *Id.* at 501. Even though the Boone County detectives' actions violated KRE 615, the Court held that the trial court comported with the remedy favored by Kentucky precedent—allowing the testimony subject to impeachment and cross-examination—and had not abused its discretion.

Turning to the missing evidence, the Court reiterated that Kentucky applied *Youngblood*'s due process standard in the form of requiring a showing that evidence was lost "outside of normal practices" or that the evidence was so significant that it compromised the defendant's due-process right to a fair trial before a defendant was entitled to an instruction. *Id.*at 503. The fact that the unpreserved portion of the bag over Mockbee's head could have been subjected to tests that could have exculpated Dooley, following *Youngblood*, was not enough for the Court to find an abuse of discretion in the withholding of the missing evidence instruction—even though the Court held that the evidence was lost outside of normal practices. *Id.* The Court affirmed the Boone Circuit Court's judgment against Dooley.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Disparate Spoliation Remedy Tests for Criminal and Civil Movants Creates a Due Process Violation and is an Issue Which Should be Resolved by This Court to Reconcile Splits in State Applications of Due Process Jurisprudence and to Fully Protect the Constitutional Rights of Criminal Defendants

Destruction of evidence by state actors has been addressed by this Court in the realm of "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valuenzuela-Bernal*, 458 U.S. 858, 867 (1982). Whatever "guarantee" the *Youngblood* approach and its progeny offer defendants in the way of due process protection is, at best, loose. Just two years after this Court reaffirmed *Youngblood* in *Illinois v. Fisher*, 540 U.S. 544 (2004), Teresa N. Chen of the West Virginia Law Review discovered that only seven defendants in 1,675 published cases—0.4%—had met the burden

of proving bad faith. 109 W. Va. L. Rev 421, 422 (2007). Today, the almost insurmountable burden placed on defendants persists. When contrasted with the lower culpability standard required for a civil movant to be entitled to spoliation relief—notably, a burden the spoliating party must rebut—it must be asked whether the *Youngblood* standard—and its widely varied interpretations—protect criminal defendants' due process rights in name only. Fed. R. Civ. P. 37(c).

A. The Decisions of State Courts of Last Resort Reflect Confusion on How This Court's Missing Evidence Precedents are to be Applied.

Thirty-three years after *Youngblood* was decided, the states are split on how *Youngblood* is meant to be applied, and there is particular confusion among the states on how *Youngblood*'s bad faith requirement relates to *Trombetta*'s two-part test for constitutional materiality. A large plurality, including the Kentucky Supreme Court, accept *Youngblood* and *Trombetta* as separate rules, with *Youngblood* controlling missing evidence with only *potentially* exculpatory value and *Trombetta* controlling missing evidence whose exculpatory value is readily *apparent* at or before its destruction. *State v. Hulsey*, 408 P.3d 408, 419 (Ariz. 2018); *People v. Lucas*, 333 P.3d 587, 646 (Cal. 2014); *People v. Wyman*, 788 P.2d 1278, 1280 (Colo. 1990); *Anderson v. State*, 220 So.3d 1133, 1148 (Fla. 2017); *People v. Sutherland*, 860 N.E.2d 178, 237 (Ill. 2006); *Albrecht v. State*, 737 N.E.2d 719, 724 (Ind. 2000); *State v. Johnson*, 301 P.3d 287, 295 (Kan. 2013); *Commonwealth v. Parrish*, 471 S.W.3d 694, 697 (Ky. 2015); *State v. Wai Chan*, 236 A.3d 471, 476 – 77 (Me. 2020); *State v. Hawkinson*, 829 N.W.2d 367, 373 (Minn. 2013); *State v. Ferguson*, 20 S.W.3d 485, 496 (Mo. 2000); *State v. Jeffries*, 410 P.3d 972, 977 – 78 (Mont. 2018); *Bever v. State*, 467 P.3d 693, 704 (Okla. Crim. App. 2020); *State v. Faunce*, 282 P.3d 960, 65 – 66 (Or. Ct. App. 2012); *Commonwealth v. Chamberlain*, 30 A.3d 381, 402 – 404 (Penn. 2011); *State v. Zephier*, 949 N.W.2d 560, 65 – 66 (S.D. 2020); *In re State ex rel. Best*, 616 S.W.3d 594, 601 (Tex. Crim.

App. 2021); *Andrews v. Commonwealth*, 699 S.E.2d 237, 266 (Va. 2010); *State v. Armstrong*, 394 P.3d 373, 379 (Wash. 2017); *State v. Luedtke*, 863 N.W.2d 592, 605 (Wis. 2015); *Willoughby v. State*, 253 P.3d 157, 171 (Wyo. 2011).

By sharp contrast, seven states conflate *Youngblood* and *Trombetta* into a single, even harsher test where a due process violation is not established and a remedy not owed unless a defendant can show (1) bad faith on the part of the state, (2) apparent exculpatory value of the lost evidence before it was destroyed, and (3) that the lost evidence is irreplaceable by reasonably available means. *Lee v. State*, 942 S.W.2d 231, 235 (Ark. 1997); *Goins v. State*, 850 S.E.2d 68, 72 – 73 (Ga. 2020); *Hardy v. State*, 137 So.3d 289, 297 (Miss. 2014); *State v. Nelson*, 807 N.W.2d 769, 785 (Neb. 2011); *State v. Lewis*, 724 S.E.2d 492, 501 (N.C. 2012); *State v. Werner*, 851 A.2d 1093, 1105 (R.I. 2004); *State v. Reaves*, 777 S.E.2d 213, 217 (S.C. 2015). These states have created a more rigorous test for federal due process violations than this Court or the several circuits. Essentially, they have demolished the floor for federal due process established by this Court.

Yet another group of jurisdictions apply their own various interpretations of this Court's precedents, including only applying *Youngblood* where the defendant seeks dismissal, crafting their own elements tests where the defendant seeks a missing evidence instruction or suppression of related testimony, and creating a sliding scale approach to missing evidence that looks to the degree of bad faith versus materiality of the evidence. *Williams v. State*, 50 P.3d 1116, 1126 (Nev. 2002); *Weems v. United States*, 191 A.3d 296, 306 (D.C. 2018); *Garcia v. State Tax Com'n of ID*, 38 P.3d 1266, 1271 (Idaho 2002); *State v. Hartsfield*, 681 N.W.2d 626, 629 (Iowa 2004); *Cost v. State*, 10 A.3d 184, 198 (Md. 2010); *People v. Dickinson*, 909 N.W.2d 24, 34 (Mich. App. 2017); *State v. Richardson*, 171 A.3d 1270, 78 – 79 (N.J. App. Div. 2017); *State v. Stills*, 957 P.2d 51, 62 (N.M. 1998); *People v.*

Handy, 988 N.E.2d 879, 882 (N.Y. 2013); *State v. Thill*, 691 N.W.2d 230, 232 (N.D. 2005); *State v. Powell*, 971 N.E.2d 865, 884 (Ohio 2012).

Apart from these jurisdictions, eleven states have rejected *Youngblood* on state constitutional grounds, holding that their state constitutions offer due process protections more expansive than the Fourteenth Amendment. *Ex parte Gingo*, 605 So.2d 1237, 1241 (Ala. 1992); *Thorne v. Department of Public Safety*, 774 P.2d 1326, 1330 (Alaska 1989); *State v. Johnson*, 951 A.2d 1257, 1283 (Conn. 2008); *Lolly v. State*, 611 A.2d 956, 959 (Del. 1992); *State v. Matafeo*, 787 P.2d 671, 673 (Haw. 1990); *Commonwealth v. Sanford*, 951 N.E.2d 922, 928 – 29 (Mass. 2011); *State v. Eason*, 577 A.2d 1203, 1207 (N.H. 1990); *State v. Merriman*, 410 S.W.3d 779, 84 – 86 (Tenn. 2013); *State v. DeJesus*, 395 P.3d 111, 118 (Utah 2017); *State v. Porter*, 103 A.3d 916, 25 – 26 (Vt. 2014) (overruled in part by *State v. Discola*, 184 A.3d 1177 (Vt. 2018)); *State v. Davis*, 752 S.E.2d 429, 444 (W.Va. 2013). Many of these states affirm Justice Stevens' prescient warning that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988) (Stevens, J., concurring.)

B. *Youngblood* and Related Precedents Create More Stringent Tests for Spoliation Remedies in Federal Courts Than Exist for Spoliation in Civil Cases.

In federal jurisdictions in particular, a dichotomy exists in how civil parties and criminal defendants are treated when the opposing party fails to disclose or preserve relevant evidence. Fed. R. Civ. P. 37(c). Rule 37(c)(1) reads:

> If a party fails to provide information or identify a witness as required by 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

A. may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
B. may inform the jury of the party's failure; and
C. may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Rule 37(c)(1) is analogous to the well-established rule of *Brady*, which requires prosecutors to disclose evidence in their control that is "material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The evidence at issue in Rule 37(c) is that which is covered by Rule 26(a) and (e), including "a copy...of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses". Fed. R. Civ. P. 26(a)(1)(A)(ii). This Court has held that a prosecutor's duty to disclose is narrower than a civil party's. *Youngblood*, 488 U.S. at 56. Nonetheless, a prosecutor's suppression of evidence by way of failure to preserve it finds its closest analogy in a civil party's failure to disclose required evidence.

Rule 37(c) makes plain that a non-spoliating civil party does not bear the burden of proving the spoliating party's culpability, which is not necessary under the rule for sanctions to be in order. *Halas v. Consumer Services, Inc.*, 16 F.3d 161, 64 – 65 (7th Cir. 1994). If the court looks to the spoliating party's culpability in determining which sanctions to order, bad faith is not required and "willfulness", "deliberate carelessness", and "gross negligence" can suffice. *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003); *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970). Regardless of any culpability finding, a court may

order any of the following after a failure to disclose required evidence or information: (1) payment of reasonable expenses caused by the failure, (2) an instruction to the jury of the party's failure, (3) other appropriate sanctions, including dismissal of the action or a default judgment against the spoliating party. Fed. R. Civ. P. 37(c)(1)(A-C); (b)(2)(A)(v-vi).

Hypothetically, if Dooley had been a civil defendant in a negligence case in federal court, the same actions by his opposing party would have entitled him to a missing evidence instruction. Here, however, *Youngblood* bars him from any remedy. *Dooley*, 2021 WL 1744453 at 10. If Dooley had sought to show evidence of contributory negligence through DNA possibly contained on the bag, he would be entitled to remedies including an adverse inference instruction because the bag was in plaintiff's exclusive control and thereafter went missing without explanation. *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 790-91 (Ky. 2011), *as modified on denial of reh'g* (Mar. 22, 2012). The Kentucky Supreme Court was briefed on this disparity in the law and, though finding it "compelling", passed on formally departing from *Youngblood* and related Kentucky precedent. *Dooley* at 10. The criminal defendant in Kentucky still holds the burden of proving a higher culpability standard on the part of the state in order to receive any missing evidence remedy, despite the criminal defendant having actual liberty at stake. *Youngblood*, 488 U.S. at 58 (unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.); *contra State v. Ferguson*, 2 S.W.3d 912, 916 – 17 (Tenn. 1999)

("[the *Youngblood*] analysis substantially increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial.") These are risks that will never be posed to a civil litigant.

The phrase "due process of law" in the Fourteenth Amendment does not imperil every minor distinction in different spheres of the law and Petitioner does not request such a construction. Rather, due process rights reference "a standard of process that may cover many varieties of processes" which must comport with "fundamental principles of liberty and justice". *Bute v. People of State of Ill.*, 333 U.S. 640, 649 (1948). In the realm of access to evidence, those fundamental principles are effectively denied by the distinctly unstandardized processes applied to persons prosecuted by the state, yet granted—as they should be—to parties to civil actions.

The relief sought is a reexamination of *Youngblood*'s rigorous bad faith requirement for criminal defendants in light of both the confusion its rule has caused among the states and the existence of a reasonable and more lenient spoliation rule for virtually identical situations in the civil law. Particularly, Petitioner requests that this Court consider a lower threshold for missing evidence or adverse inference instructions where bad faith has not or cannot be shown, with Petitioner drawing this Court's attention to the balancing test approaches taken by Alabama and Delaware, among other states. *Gurley v. State*, 639 So.2d 557, 567 (Ala. Crim. App. 1993) (citing *Ex parte Gingo*, 605 So.2d 1237, 1240 (Ala. 1992)) (holding that Alabama identifies and cures due process violations resulting from

missing evidence by weighing (1) the degree of negligence or bad faith involved, (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available, and (3) the sufficiency of the other evidence adduced at trial to sustain conviction); *Deberry v. State*, 457 A.2d 744, 750 (Del. 1983) (holding that Delaware identifies due process violations caused by missing evidence by asking (1) would the requested evidence have been subject to *Brady* disclosure, (2) if so, did the government have a duty to preserve the evidence, (3) if so, was that duty breached, and holding that Delaware fashions remedies for identified violations by weighing the same three factors as Alabama). Petitioner also seeks a determination as to whether the difference between *Youngblood* and Rule 37(c) creates a due process violation as applied to criminal defendants who cannot show bad faith.

II. The Split of Authority in the Federal Circuits On Whether Trial Courts violate Due Process by Allowing State Actors to Willfully and Collusively Violate Separation of Witness Orders Without Excluding the Tainted Witness' Testimony Should Be Resolved by This Court

Separation of witnesses witnesses, dating back to the tale of Susanna in the Bible, "is one of the ancient heirlooms of the American system of common law, and as such deserves thoughtful protection and consistent interpretation." 6 J. Wigmore, Evidence s 1837, p. 348 (3d ed., 1840). The purpose behind the separation of witnesses rule is to ensure the integrity of the trial by denying a witness the opportunity to alter his testimony. *Commonwealth, Department of Highways v.*

Riley, 414 S.W.2d 883 (Ky. 1967); *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982). The aim in sequestering witnesses is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses and it aids in detecting testimony that is less than candid. *See* Wigmore, Supra, s 1838; F. Wharton, Criminal Evidence s 405 (C. Torcia ed. 1972). Sequestering a witness over a recess called before testimony is completed serves a third purpose as well—preventing improper attempts to influence the testimony in light of the testimony already given. *Geders v. United States*, 425 U.S. 80, 87 (1976). The rule on witnesses is codified in the federal law as Federal Rule of Evidence 615, which provides:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
>
> a) a party who is a natural person;
> b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
> c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
> d) a person authorized by statute to be present. FRE Rule 615.

Language similar or identical to Rule 615 can be found in several states' rules of evidence, including Kentucky's Rule of Evidence 615, which reads:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> 1) A party who is a natural person;
> 2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> 3) A person whose presence is shown by a party to be essential to the presentation of the party's cause. Ky. St. Rev. Rule 615.

Both the Kentucky Supreme Court and Kentucky Court of Appeals have held that the two are "identical" for purposes of interpreting and constructing KRE 615 in state cases. *Meece v. Commonwealth*, 348 S.W.3d 627, 698 (Ky. 2011); *Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1998); *Skarupa v. Owensboro Health Healthpark*, 583 S.W.3d 33, 35 (Ky. Ct. App. 2019). However, the federal circuits have not dealt with violations of the rule and the remedy owed to the defendant when state actors cause a violation of the rule in a consistent manner.

The controlling principle for determining what a trial court must do to cure the prejudice caused by a violation of the rule on witnesses is this Court's decision in *Holder*, where this Court held that tainted witnesses cannot be disqualified nor their testimony excluded solely because of a violation of the rule on witnesses. *Holder v. United States*, 150 U.S. 91, 92 (1893); *United States v. Kiliyan*, 456 F.2d 555, 560 (8th Cir. 1972). However, this Court appeared to carve an exception from that general rule by stating "although the right to exclude under *particular circumstances* may be supported as within the sound discretion of the trial court." *Holder*, 150 U.S. at 92 (emphasis added). This language, not revisited by this Court in over a century, has formed the basis for disagreement among the several circuits. Of import for states like Kentucky, whose rule on witnesses tracks the Court of Appeals for the Sixth Circuit's interpretation of FRE 615, this confusion has been imported into state law cases such as Dooley's.

Generally, the remedy for a violation of a witness separation order is left to the sound discretion of the trial court. *Taylor v. United States*, 388 F.2d 786 (9th

Cir. 1967); *United States v. Bostic*, 327 F.2d 983 (6th Cir. 1964). Because the purpose of the rule is to prevent one witness' testimony from being shaped by another's, violations of the rule can occur inside or outside of the courtroom. *United States v. Collins*, 340 F.3d 672, 681 (8th Cir. 2003); *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986). If a violation is established, a trial court may exclude the witness, grant a mistrial, grant a new trial, or exact other remedies if the defendant can prove the existence of prejudice as a result of the violation. *Greschner*, 802 F.2d at 376; *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004); *United States v. Engelmann*, 985 F.Supp.2d 1042, 1049 (S.D. Iowa 2013); *United States v. Williams*, 604 F.2d 1102, 1115 (8th Cir. 1979); *United States v. Oropeza*, 564 F.2d 316, 326 (9th Cir. 1977); *United States v. Vario*, 484 F.2d 1052, 1056 (2nd Cir. 1973).

However, there are cases in which a trial court's failure to offer some remedy constitutes a violation of due process. When particular circumstances show that the violation of a witness separation order occurred with the "consent, connivance, procurement, or knowledge" of the party seeking the testimony, exclusion of the tainted witness' testimony is justified in the Sixth, Seventh, Eighth, and Ninth circuits. *Bostic*, 327 F.2d at 983; *United States v. Schaefer*, 299 F.2d 625, 632 (7th Cir. 1962); *United States v. Kiliyan*, 456 F.2d 555, 560 (8th Cir. 1972); *Taylor*, 388 F.2d at 788. The Second and Seventh circuits have applied this rationale to state actors not subject to exemption under FRE 615(b) in holding that permitting tainted testimony where there is evidence of government collusion or willful, strategic state

violation of a witness separation order is an abuse of discretion—indicating that state actors are held to a higher standard when they violate a witness separation order. *United States v. Gammon*, 961 F.2d 103, 105 (7th Cir. 1992); *United States v. Thomas*, 774 F.2d 807, 810 (7th Cir. 1985); *United States v. Barret*, 848 F.3d 524, 533 (2nd Cir. 2017). The other circuits do not appear to have adopted this rule, though it is a logical extension of this Court's precedents dating back to *Holder*.

Here, FRE 615's state law analog was applied by the Kentucky Supreme Court in a manner discordant with the Sixth Circuit and the several circuits. As shown in *Bostic*, exclusion of tainted testimony is justified in the Sixth Circuit when the violation was caused with the "consent, connivance, or knowledge" of the party seeking the testimony. 327 F.2d at 983. The taint here apparently happened with the Commonwealth's consent, connivance, or knowledge. These particular circumstances show that agents of the Commonwealth willfully and strategically informed Chris Black as a yet-to-testify witness of the substance of Dan Mockbee's testimony in hopes of tailoring Black's testimony to align with the Commonwealth's case. In the Second and Seventh circuits, exclusion of Black's testimony would not only be justified but would be mandatory, following federal precedents from *Barret* back to *Holder*, yet the Kentucky Supreme Court interpreted an identical rule to arrive at precisely the opposite conclusion. *Dooley*, 2021 WL 1744453 at 9.

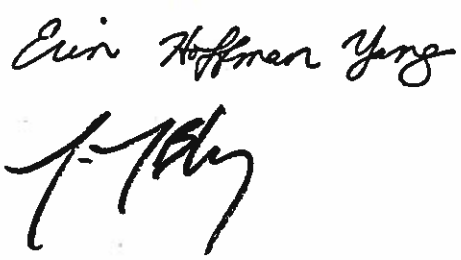
The question presented is whether the government's willful and strategic violation of a witness separation order falls under the particular circumstances referenced in *Holder*, and whether the trial court violated Dooley's due process

rights in permitting the tainted testimony. Petitioner requests this Court to harmonize the circuits' varying interpretations of *Holder* and clarify the particular circumstances under which inclusion of testimony tainted by state action renders a trial fundamentally unfair and denies a defendant due process.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner David Dooley prays that this Court grant this Petition for a Writ of Certiorari, vacate the decision of the Kentucky Supreme Court, and remand the matter for further proceedings.

Respectfully submitted,



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