

291 S.W.3d 692
Victor Dewayne TAYLOR, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.
No. 2008-SC-000273-MR.
Supreme Court of Kentucky.
June 25, 2009.
Rehearing Denied October 1, 2009.

[291 S.W.3d 693]

Thomas More Ransdell, Heather Christina McGregor, Assistant Public Advocates, Department of Public Advocacy, Frankfort, KY, Dennis James Burke, Assistant Public Advocate, Department of Public Advocacy, LaGrange, KY, for Appellant.

Jack Conway, Attorney General, Matthew Robert Krygiel, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, Frankfort, KY, for Appellee.

Opinion of the Court by Justice NOBLE.

At a jury trial, Appellant Victor Dewayne Taylor was convicted of two counts of murder, kidnapping, first-degree robbery, and one count of first-degree sodomy. He was sentenced to death on each of the murder charges and twenty years' imprisonment on each of the other charges. On this matter of right appeal, Ky. Const. § 110(2)(b), Appellant argues that the trial court should not have dismissed his KRS 422.285 proceeding without submitting an anal swab for DNA testing or holding an evidentiary hearing to determine why the Commonwealth did not make the swab at issue available. Finding Appellant's argument unpersuasive, the trial court is affirmed.

I. Background

When the bodies of the two murder victims in this case were discovered in 1984, they were missing their pants and the medical examiner collected anal swabs from them. The anal swab collected from one of the victims yielded a sample of human spermatozoa, but serological testing

done on the anal swab to determine ABO blood grouping for trial purposes failed to produce any result. The trial in this matter pre-dated modern DNA testing.

Subsequently, Taylor filed a federal habeas corpus petition in the United States District Court for the Eastern District of Kentucky, and moved for funds to conduct DNA testing on the anal swab. The District Court determined Taylor had a state court remedy because he had never requested DNA testing pursuant to KRS 422.285, and ordered Taylor to first exhaust his state options for DNA testing.

Taylor then filed a motion (petition) in Fayette Circuit Court, requesting DNA testing pursuant to KRS 422.285, the statute permitting persons sentenced for capital crimes to request DNA testing, and

[291 S.W.3d 694]

review of the evidence to be tested began. Sometime later, the Commonwealth informed Taylor and the trial court that it had conducted its own DNA testing on one of the two slides remaining from the anal swab, Exhibit 38-1,¹ contrary to a previously entered preservation of evidence order by the Circuit Court. The Commonwealth sent one of the slides to Orchid Cellmark Laboratory, and the report indicated it was unsuccessful in obtaining results from its testing. Therefore, one slide remained, and Taylor wished to have it tested under a new form of DNA testing known as mini-Short Term Repeat ("mini-STR") by Bode Technology Group.²

The Commonwealth produced an inventory of evidence as required by KRS 422.285(6).³ In reference to "Lab Report Number 84-2-3096," one of the original lab reports prepared by Durbin before the original trial in this case, the Commonwealth's inventory of items located at the Jefferson Regional Crime Lab erroneously included "Exhibit 38: Anal swab from [one of the victims in this case]."

The trial court subsequently entered an order modifying its previous preservation order and directing the Kentucky State Police Jefferson Regional Laboratory to

send all evidence related to the anal swabs collected from [one of the victims in this case] (KSP exhibit 38); including, if they exist, the anal swabs, all slides developed from the anal swabs, any sticks that were originally part of the anal swabs, any packaging that has been used to hold the anal swabs or slides, and any containers that have been used to process the anal swabs; to Bode Technology Group ... where it shall be subjected to mini-STR DNA testing and analysis.

Bode Technology Group was unable to develop a DNA profile from the two slides submitted by the Commonwealth (one of which had already been subjected to testing by the Commonwealth), and Taylor filed a motion in the Fayette Circuit Court, Special Division, requesting an evidentiary hearing be held to determine why the Commonwealth had not also sent the anal swab listed in its inventory of evidence to Bode Technology Group, and arguing that a hearing was needed regarding the Commonwealth's preemptive testing of one of the slides. Taylor's motion for an evidentiary hearing was denied and his KRS 422.285 proceeding was dismissed.

II. Analysis

Despite the fact that the Commonwealth's inventory of evidence copied a portion of the lab report prepared for the original trial in this case, a review of the record demonstrates that the parties understood that the anal swab had been consumed and only the slides derived from the anal swab remained for DNA testing. The initial petition acknowledged "that the swabs were consumed in analysis ... However, some sort of a slide must have been made in order for the contents of the swab to have been examined

under a microscope so that the determination could be made that human spermatozoa were

[291 S.W.3d 695]

present...." The trial judge's order specifically directed the Jefferson Regional Laboratory to "send all evidence related to the anal swabs collected from [one of the victims in this case] (KSP exhibit 38); including, *if they exist*, the anal swabs, all slides developed from the anal swabs...." (Emphasis added.) It is clear from the record that neither the trial judge nor counsel for either party presumed any actual anal swabs were still in existence. The parties specifically referred to and discussed the slides.

Taylor cites *Arey v. State*, 400 Md. 491, 929 A.2d 501 (2007), in support of his position. In *Arey*, Maryland's highest court agreed that the trial court erred in dismissing the appellant's petition for testing based on a police officer's representation that because he had checked the Evidence Control Unit and the forms on file, it was reasonable to conclude the evidence no longer existed. The Court concluded that "[s]earching the ECU alone was insufficient," and that "[b]ecause the State was the custodian of evidence, the State needs to check any place the evidence could reasonably be found, unless there is a written record that the evidence had been destroyed in accordance with then existing protocol." *Id.* at 503-04. In sum, the Court held "a court should not conclude that evidence no longer exists until the State performs a reasonable search for the requested evidence." *Id.* at 504.

Arey is distinguishable because the record in this case demonstrates that the parties understood there were only two slides remaining. Additionally, because the lab report prepared by Durbin said the anal swab was consumed in testing, it fits within the exception in *Arey* for "written evidence that the evidence had been destroyed...." *Id.* at 504.

Taylor's initial petition shows that from the beginning he was well aware of the fact that there was no longer a swab, but that he thought there

were slides containing spermatozoa. Obviously, the Commonwealth merely made a mistake in incorrectly transcribing the list of remaining evidence. Thus there is no valid argument that there was improper destruction of evidence regarding the swab.

However, the larger question goes to the Commonwealth's preemptive test of one of the slides. Though the Commonwealth technically disobeyed the court's preservation of evidence order by testing one of the slides, the testing it did was not an improper form of testing, and the Commonwealth's mistake in testing one of the slides does not rise to the level of misconduct that would require us to reverse for a new trial in this case. Taylor cannot establish under the statute that even if he had both slides available for DNA testing under his preferred method, that he would have been able to establish anything more than a mere possibility — as opposed to the "reasonable probability" required under the statute — of exculpatory evidence. Consequently, there being no evidence favorable to him, the trial court was not required to hold a hearing and properly dismissed the KRS 422.285 petition.

III. Conclusion

Under KRS 422.285(1), a defendant may request DNA testing and analysis of any evidence that is in the possession or control of the court or Commonwealth. Following the testing, the court is required to hold a hearing only "if the results of the DNA testing and analysis are favorable to the petitioner." KRS 422.285(9). However, "[i]f the results of the DNA testing and analysis are not favorable to the petitioner, the court shall dismiss the petition." KRS 422.285(8). Here, the laboratories were unable to get a DNA profile from any of the samples submitted. Therefore, the

[291 S.W.3d 696]

test results were not favorable to the petitioner, and the trial court correctly dismissed his petition.

For the foregoing reasons, the judgment of the Fayette Circuit Court dismissing Taylor's KRS 422.285 proceeding is affirmed.

All sitting. All concur.

Notes:

1. In preparation for trial, the anal swab at issue, "Exhibit 38" from the lab report prepared by William Morris Durbin, a forensic serologist at the Jefferson Regional Crime Lab, was used by Durbin to create two slides for his testing ("Exhibits 38-1 and 38-2"), and he noted in his report that the swab was consumed as part of his testing.
 2. The Commonwealth describes the testing performed on Exhibit 38-1 by Orchid Cellmark Laboratory as merely "standard STR" testing.
 3. KRS 422.285(6) provides in part: "The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court."
-

responses (or lack of a response), a defendant "must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause."¹³ When applying this test to the facts, it is clear that Taylor does not merit a new trial.

Essentially there are three elements a defendant must show to deserve a new trial because of juror mendacity during *voir dire*. First, a material question must have been asked. Second, the juror must have answered the question dishonestly.

Page 75

And finally, the truthful answer to the material question would have subjected the juror to being stricken for cause. Here, there was a material question asked to the juror. A question about whether a potential juror believes she can consider the full range of penalties upon a conviction for murder is about as material as they come. However, Taylor fails to show that the juror answered the question dishonestly or that she should have been stricken for cause. During *voir dire* the juror was directly asked by the judge about her beliefs about capital punishment:

Judge: Do you have any belief, religious, philosophical or moral, regarding capital punishment, either for or against?

Juror: Do I need to answer that with a yes or no?

Judge: Any way you wish to.

Juror: I feel that there are circumstances where it is a justified reason for capital punishment but I think the evidence would have to weigh this before I made a decision.

Judge: Would it be fair that in your mind you have no fixed position, that you are neither opposed for moral or religious or whatever reasons or for either way?

Juror: No.

Judge: That your mind is open on that issue?

Juror: Yes sir.

And she was also questioned by the defense counsel.

Counsel: I don't want to try and lead you or anything but what I would like for you to do if possible is just tell me how you feel about the death penalty in general. What would be your viewpoint on it?

Juror: I think that there are situations where the death penalty is justifiable and I think there again, it goes back to the situation and the evidence presented that would justify whether or not a person's life should be taken.

Counsel: Do you feel that everybody convicted of murder should get the death penalty?

Juror: Not necessarily.

Counsel: You have heard about aggravating factors, such as robbery or something like that. Do you feel that people who are convicted of murder plus an aggravating factor should automatically get the death penalty?

Juror: No, sir, I don't think so.

Taylor acknowledges these statements by the juror, but argues that she did not say the complete truth, and that if she had she would have been stricken for cause. We disagree. The statement the juror made at the post-conviction hearing that Taylor bases his argument on is that "God's word does say that the death penalty is appropriate for murderers." But this was already stated, albeit in a different way, as a response to both the judge and defense counsel. Taken in context, the juror's responses indicate that she was willing to take the evidence as it was presented and to reach a conclusion consistent with what the facts would allow. There is no reversible error in that. We hold that the juror answered honestly, and that

the trial judge was correct in denying Taylor's CR 60.02 motion for a new trial based on her answers during *voir dire*.

IV. The statute

Finally, Taylor challenges KRS 422.285 as unconstitutional because it encroaches upon powers assigned to the judiciary. Specifically, he claims that this statute contravenes the separation of powers provisions located in Sections 27 and 28 of the Kentucky Constitution. It is

Page 76

important to note that Taylor did not move the trial court to grant deoxyribonucleic acid (DNA) testing as provided for in the statute. Instead, he sought a declaratory judgment that the statute was unconstitutional.

Kentucky enacted KRS 422.285 in 2002 to allow a person convicted of and sentenced to death for a capital offense to request DNA testing of any evidence in the possession of the Commonwealth, provided that certain preliminary issues are resolved, e.g., condition of the evidence. There are also notice provisions contained in the statute that require a petitioner to inform the Commonwealth of the testing and grant it access to the laboratory reports.¹⁴

KRS 422.285 was part of a wave of similar statutes in other states passed in response to a number of death-row inmates who were released from custody as a result of being exonerated by DNA testing nationwide.¹⁵ DNA is the "genetic material present in the nucleus of cells in all living organisms,"¹⁶ and it stores each individual's inherited traits. Though there are a number of processes by which DNA may be tested, all have essentially four basic steps. First, samples from a known and unknown source are isolated. Second, testing is conducted on each sample. Third, the DNA type is determined by analyzing particular regions of each sample's DNA. Finally, the results are compared between samples to verify whether the samples originated from a common source.

After the testing process one of three results will be reached: that the samples originate from a common donor, that the samples do not originate from a common donor, or that the test is inconclusive.¹⁷

As noted above, Taylor challenges this statute because he feels it unconstitutionally infringes upon the judiciary's right to set court procedures in violation of the separation of powers provisions of Kentucky's Constitution. For support, he cites *Foster v. Overstreet*¹⁸ and *Commonwealth v. Reneer*,¹⁹ stating that each case is "directly on point." In both of those cases we held that the statute in question was unconstitutional as an encroachment on the rule-making prerogative of the judiciary. In holding the statute in *Reneer* unconstitutional we noted that the statute was procedural in nature, neither adding nor removing elements necessary to convict or alter the penalty for a conviction.²⁰ Such a procedural enactment invaded this Court's authority to prescribe rules pursuant to section 116 of our Constitution,²¹ and, as such, violated the separation of powers provision enunciated in Section 28 of the Kentucky Constitution.²²

Page 77

Likewise, the statute that Taylor challenges is a procedural enactment, which in no way modifies any elements necessary to convict or penalties to be imposed upon conviction. Therefore, we hold that KRS 422.285 infringes a constitutional power properly belonging to the Supreme Court. Nevertheless, not all statutes that unconstitutionally infringe upon the rule-making power of the Supreme Court have been struck down entirely. We retain the right to enforce such statutes by way of comity. In fact, the statutes in the two cases cited by Taylor as being "directly on point" were enforced by the Court by way of comity.²³

Principles of comity enjoy a strong history in our Commonwealth and in this nation, and remain a sound rule of law.²⁴ In *O'Bryan v. Hedgespeth* we expressed it thusly: "Comity, by definition, means the judicial adoption of a rule

unconstitutionally enacted by the legislature not as a matter of obligation but out of deference and respect."²⁵ But we do not go about deciding whether to grant comity to an otherwise inappropriate statute without cognizable standards. In order for a statute to be extended comity this Court must find that such a statute is a "statutorily acceptable substitute for current judicially mandated procedures"²⁶ or can be "tolerated in a spirit of comity" because it does not unreasonably interfere with the "orderly functioning of the courts."²⁷ It is clear that KRS 422.285 meets the latter standard we use to determine whether comity should be extended. In fact, under prevailing law, without the statutory privileges in KRS 422.285 a defendant who has been convicted of a capital crime and sentenced to death would not have an opportunity to request DNA testing of existing evidence. A statute allowing a death-row inmate to obtain DNA testing furthers the interest of justice by better ensuring that the Commonwealth does not follow through with putting an innocent man to death. In the words of our precedent, such a statute furthers the "orderly functioning of the courts" and is a "statutorily acceptable substitute for current judicially mandated procedures." Therefore, we uphold, under principles of comity, KRS 422.285 until superseded or modified by this Court.²⁸

Accordingly, we affirm the trial court's decision to deny Taylor's CR 60.02 motion for a new trial based on the recanted testimony of Wade. We also affirm the trial court's denial of Taylor's CR 60.02 motion for a new trial based upon his belief that a juror was dishonest in answering questions during *voir dire*. Finally, we hold that KRS 422.285 is an unconstitutional encroachment of the Court's rule-making prerogatives. However, we extend comity to that statute.

Page 78

GRAVES, SCOTT, and WINTERSHEIMER, JJ., concur.

COOPER, J., files a separate opinion concurring in part and dissenting in part in which JOHNSTONE, J., joins.

KELLER, J., dissents by separate opinion.

Notes:

1. Taylor's two death sentences for the kidnapping convictions were reversed on direct appeal in *Taylor v. Commonwealth*, 821 S.W.2d 72, 77 (Ky.1990).
2. *Taylor*, 821 S.W.2d 72.
3. *E.g.*, *Averitte v. Hutchinson*, 420 S.W.2d 581, 582 (Ky.1967).
4. 488 S.W.2d 338 (Ky.1972).
5. *Id.* at 339.
6. *Id.*
7. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
8. *Id.* at 1365.
9. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
10. KRE 801A(a)(1) allows a statement into evidence that would otherwise be excluded by the hearsay rule because the previous statement is inconsistent with the declarant's testimony at a trial or hearing in which the defendant has the opportunity to question the witness against him.
11. 311 Ky. 676, 680, 225 S.W.2d 109, 112 (1949).
12. *Hicks v. Commonwealth*, 670 S.W.2d 837, 839 (Ky.1984).
13. *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky.2003) citing *McDonough Power Equip. Co. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984).
14. KRS 422.285.

15. See generally Heidi C. Schmitt, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L.Rev. 1001 (2002).

16. Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, Pub. No. 177626, *Post-conviction DNA Testing: Recommendations for Handling Requests* 21 (1999).

17. *Supra* n. 14.

18. 905 S.W.2d 504 (Ky.1995).

19. 734 S.W.2d 794 (Ky.1987).

20. *Id.* at 796.

21. Section 116 of the Kentucky Constitution states that "[t]he Supreme Court shall have the power to prescribe . . . rules of practice and procedure for the Court of Justice."

22. Section 28 of the Kentucky Constitution states that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

23. In *Commonwealth v. Reneer* we stated that although the truth in sentencing statute violates constitutional separation-of-powers provision, it would not be held unconstitutional and would be accepted for time being under principle of comity. 734 S.W.2d at 797. In *Foster v. Overstreet* we held a statute providing review of trial judge's impartiality by Chief Justice unconstitutional, but nevertheless upheld its provisions under principles of comity. 905 S.W.2d at 506.

24. See *Key v. Commonwealth*, 6 Ky. (3 Bibb) 495 (1814) (discussing "comity among nations") and *Williams v. Jones*, 77 Ky. (14 Bush) 418 (1878) (dealing with comity between states).

25. 892 S.W.2d 571, 577 (1995) (citing BLACK'S LAW DICTIONARY 242 (5th ed.1979)).

26. *Drumm v. Commonwealth*, 783 S.W.2d 380, 382 (Ky.1990).

27. *Reneer*, 734 S.W.2d at 797.

28. E.g., *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 158 (Ky.1982).

COOPER, Justice, concurring in part and dissenting in part.

I concur in the majority's analysis of the only issues presented to us by this CR 60.02 motion, i.e., whether Appellant should be granted relief from the final judgment on the basis of newly discovered evidence. I dissent, however, from the majority's gratuitous suggestion that the admission at trial of George Wade's "confession" in which he claimed Appellant was the sodomizer and triggerman in these gruesome crimes could be "cumulative evidence" or "harmless error."

In *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky.1990) ("*Taylor I*"), we upheld the admission of Wade's statement under the common-law hearsay exception for statements against penal interest because the statement also inculpated Wade as an accomplice, i.e., it was, in fact, a statement against Wade's penal interest. *Id.* at 75. See KRE 804(b)(3). When the issue was raised again on appeal from the denial of Appellant's RCr 11.42 collateral attack, *Taylor v. Commonwealth*, 63 S.W.3d 151, 166-68 (Ky.2001) ("*Taylor II*"), the United States Supreme Court had decided *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), in which a plurality of the Court held that Rule 804(b)(3) was not an available vehicle for admission of an out-of-court statement by a nontestifying codefendant that inculpated the defendant. However, we again upheld the admission of Wade's statement because the relevant holding in *Lilly*, as a plurality decision, was not binding precedent, and because Wade's statement also possessed "adequate indicia of reliability" demonstrated by "particularized guarantees of trustworthiness," so that its admission was

authorized by *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). *Taylor II*, 63 S.W.3d at 166-67.

Subsequent to our decision in *Taylor II*, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which not only reaffirmed the plurality opinion in *Lilly*, *id.* at 55, 124 S.Ct. at 1367 ("[A]ccomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule.") (quoting *Lilly*, 527 U.S. at 134, 119 S.Ct. at 1899), this time in the context of a majority opinion, but also overruled *Roberts*, *id.* at 69, 124 S.Ct. at 1374, thus removing any remaining underpinning for the admission of such evidence in *Taylor*. In fact, the Court specifically identified *Taylor II* as an example of the type of error fostered by *Roberts*. *Id.* at 64, 124 S.Ct. at 1371.

We recently recognized the effect of *Crawford* on our *Taylor* decisions in *Terry v. Commonwealth*, 153 S.W.3d 794, 799-800 (Ky.2005). Presumably, that is why the majority of this Court feels compelled to attempt to defend our *Taylor* decisions on the "newly discovered" basis of "cumulative evidence" and "harmless error." These issues were not raised in *Taylor I* or *Taylor II* and are not raised now. We need not defend our previous *Taylor* decisions. Both were supported by what appeared to be sound legal principles extant at the time they were decided. The United States Supreme Court subsequently decided otherwise — which is its prerogative when construing the Confrontation Clause of the Sixth Amendment of the United States Constitution. There is no good reason for us to *sua sponte* attempt to justify our prior decisions by conjuring and deciding

Page 79

new issues that are not before us. However, there is a very good reason not to do so. The position of a Court of Justice is that of neutral arbiter, not advocate. Our job is to apply sound legal principles to the facts and issues before us — not

to advocate to the federal courts how they should decide an issue that is no longer before us.

Even if that were not so, Wade's statement inculcating Appellant as the sodomizer and triggerman in this case was either admissible or not, and that decision will ultimately be decided by the federal courts on habeas corpus review. However, the admission of Wade's statement was neither cumulative nor harmless. The only two people who know who actually committed the sodomy and murders are Appellant and Wade. In his statement to the police, Wade admitted to his participation in the kidnappings and thefts but claimed that he left the scene before Appellant committed the sodomy and murders, and that he heard the gunshots as he was leaving the scene. Appellant exercised his Fifth Amendment right not to testify in his own behalf. Thus, the only evidence of who was the actual sodomizer and triggerman was contained in Wade's self-serving, out-of-court statement that cast the blame on Appellant.

"The relevant inquiry under the harmless error doctrine 'is whether there is a reasonable possibility that the evidence complained of *might have contributed to the conviction.*'" *Jarvis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky.1998) (emphasis added) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This same "harmless error" standard was reaffirmed as the basis for evaluating constitutional errors (such as this claimed Confrontation Clause violation) in *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless." *Id.* at 23-24, 87 S.Ct. at 828. Obviously, Wade's out-of-court statement was neither cumulative nor harmless.

But we should not address this issue at all. Appellant filed his CR 60.02 motion seeking relief on the basis of newly discovered evidence and that is the only issue before us. Even though *Crawford* was decided prior to the filing of Appellant's brief to this Court (and is cited on

page 1 thereof), Appellant has not asked this Court to grant him relief from the judgment on the basis of "change of law." Nor has the Commonwealth asked us to reaffirm the judgment on the basis of "cumulative evidence" or "harmless error."

"Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) [federal equivalent of CR 60.02(f)]. . . ." *Agostini v. Felton*, 521 U.S. 203, 239, 117 S.Ct. 1997, 2018, 138 L.Ed.2d 391 (1997). That is true even when the intervening change results from a decision of the United States Supreme Court that is directly on point. Consider:

In the previous appeal in this qui tam action under the False Claims Act (FCA), *Garibaldi I* [*United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir.2005)], we vacated the plaintiffs' judgment on the verdict, and rendered judgment for the Orleans Parish School Board holding that the board was not a "person" subject to liability under the FCA. This court's judgment in that case became final when the Supreme Court denied certiorari. Subsequently, the Supreme Court, in *Cook County v. United States ex rel. Chandler*, [538 U.S. 119, 123 S.Ct.

Page 80

1239, 155 L.Ed.2d 247 (2003)] held that local governments are "persons" amenable to qui tam actions under the FCA. Following the Supreme Court's decision in *Chandler*, the plaintiffs filed a motion in the district court for relief under Rule 60(b)(6) from this court's final judgment in *Garibaldi I*. The district court concluded that *Chandler* had overruled *Garibaldi I*, granted plaintiffs' motion, and re-entered its judgment on the verdict for the plaintiffs against the school board. The school board appealed. We reverse. In the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6). The circumstances here are not "extraordinary"

because this case in [sic] not materially distinguishable from the "ordinary" case in which a subsequent change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 397 F.3d 334, 335-36 (5th Cir.2005) (internal footnotes omitted). *See also Morris v. Horn*, 187 F.3d 333, 341-42 (3rd Cir.1999). Admittedly, there are cases holding that a particular change in the law created an "exceptional circumstance" warranting Rule 60(b)(6) review. *E.g.*, *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2nd Cir.2004) (change in deportation law). However, it is inappropriate for us to address whether *Crawford* requires a different result in this case when Appellant has not claimed that it does.

JOHNSTONE, J., joins this opinion.

KELLER, Justice, dissenting.

I respectfully dissent, primarily for the reasons expressed in my dissent in Taylor's second appeal of his conviction and death sentence.¹ Though I do not wish to engage in an extended analysis again, I must point out that the trial court committed an error of constitutional magnitude when it allowed George Wade's statement to be introduced into evidence. The Supreme Court of the United States recognized this error when it overruled *Ohio v. Roberts*² and cited our opinion in Taylor's second appeal as an example of "[t]he unpardonable vice of . . . *Roberts* . . . [i.e.,] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."³ We also recognized this error when we noted that *Crawford* "remov[ed] any remaining underpinning for the admission of such evidence in *Taylor*."⁴

Given the magnitude of Wade's testimony, which was the only evidence that identified Taylor as the shooter in these murders, it is inconceivable that we could label its introduction as harmless error. By refusing to reverse Taylor's

conviction a *third* time, however, we are simply allowing this blatant error to stand, perhaps in the hope that the federal courts will address the issue. While I have no doubt that they will, and that they should, we do

Page 81

not need to wait for the federal courts to provide maid service to clean up the mess created by our flawed evidentiary ruling, especially when this case is already over fifteen years stale. We perform an additional disservice to both the Commonwealth and Appellant by adding further to the staleness and possible loss of the evidence when we once again ignore the law and fail to reverse and remand for a new trial at this time.

Notes:

1. See *Taylor v. Commonwealth*, 63 S.W.3d 151, 168 (Ky.2001) (Keller, J., dissenting).

2. 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

3. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); see also *Terry v. Commonwealth*, 153 S.W.3d 794, 800 (Ky.2005) ("The [United States Supreme] Court specifically identified *Taylor II* as an example of the type of error attributable to *Roberts*.").

4. *Terry*, 153 S.W.3d at 800; *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky.2004) (recognizing that *Crawford* abrogated our decision in *Taylor v. Commonwealth*, 63 S.W.3d 151 (Ky.2001) as to this issue).

authorized by *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). *Taylor II*, 63 S.W.3d at 166-67.

Subsequent to our decision in *Taylor II*, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which not only reaffirmed the plurality opinion in *Lilly*, *id.* at 55, 124 S.Ct. at 1367 ("[A]ccomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule.") (quoting *Lilly*, 527 U.S. at 134, 119 S.Ct. at 1899), this time in the context of a majority opinion, but also overruled *Roberts*, *id.* at 69, 124 S.Ct. at 1374, thus removing any remaining underpinning for the admission of such evidence in *Taylor*. In fact, the Court specifically identified *Taylor II* as an example of the type of error fostered by *Roberts*. *Id.* at 64, 124 S.Ct. at 1371.

We recently recognized the effect of *Crawford* on our *Taylor* decisions in *Terry v. Commonwealth*, 153 S.W.3d 794, 799-800 (Ky.2005). Presumably, that is why the majority of this Court feels compelled to attempt to defend our *Taylor* decisions on the "newly discovered" basis of "cumulative evidence" and "harmless error." These issues were not raised in *Taylor I* or *Taylor II* and are not raised now. We need not defend our previous *Taylor* decisions. Both were supported by what appeared to be sound legal principles extant at the time they were decided. The United States Supreme Court subsequently decided otherwise — which is its prerogative when construing the Confrontation Clause of the Sixth Amendment of the United States Constitution. There is no good reason for us to *sua sponte* attempt to justify our prior decisions by conjuring and deciding

Page 79

new issues that are not before us. However, there is a very good reason not to do so. The position of a Court of Justice is that of neutral arbiter, not advocate. Our job is to apply sound legal principles to the facts and issues before us — not

to advocate to the federal courts how they should decide an issue that is no longer before us.

Even if that were not so, Wade's statement inculcating Appellant as the sodomizer and triggerman in this case was either admissible or not, and that decision will ultimately be decided by the federal courts on habeas corpus review. However, the admission of Wade's statement was neither cumulative nor harmless. The only two people who know who actually committed the sodomy and murders are Appellant and Wade. In his statement to the police, Wade admitted to his participation in the kidnappings and thefts but claimed that he left the scene before Appellant committed the sodomy and murders, and that he heard the gunshots as he was leaving the scene. Appellant exercised his Fifth Amendment right not to testify in his own behalf. Thus, the only evidence of who was the actual sodomizer and triggerman was contained in Wade's self-serving, out-of-court statement that cast the blame on Appellant.

"The relevant inquiry under the harmless error doctrine is whether there is a reasonable possibility that the evidence complained of *might have contributed to the conviction.*" *Jarvis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky.1998) (emphasis added) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This same "harmless error" standard was reaffirmed as the basis for evaluating constitutional errors (such as this claimed Confrontation Clause violation) in *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless." *Id.* at 23-24, 87 S.Ct. at 828. Obviously, Wade's out-of-court statement was neither cumulative nor harmless.

But we should not address this issue at all. Appellant filed his CR 60.02 motion seeking relief on the basis of newly discovered evidence and that is the only issue before us. Even though *Crawford* was decided prior to the filing of Appellant's brief to this Court (and is cited on

page 1 thereof), Appellant has not asked this Court to grant him relief from the judgment on the basis of "change of law." Nor has the Commonwealth asked us to reaffirm the judgment on the basis of "cumulative evidence" or "harmless error."

"Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) [federal equivalent of CR 60.02(f)]. . . ." *Agostini v. Felton*, 521 U.S. 203, 239, 117 S.Ct. 1997, 2018, 138 L.Ed.2d 391 (1997). That is true even when the intervening change results from a decision of the United States Supreme Court that is directly on point. Consider:

In the previous appeal in this *qui tam* action under the False Claims Act (FCA), *Garibaldi I* [*United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir.2005)], we vacated the plaintiffs' judgment on the verdict, and rendered judgment for the Orleans Parish School Board holding that the board was not a "person" subject to liability under the FCA. This court's judgment in that case became final when the Supreme Court denied certiorari. Subsequently, the Supreme Court, in *Cook County v. United States ex rel. Chandler*, [538 U.S. 119, 123 S.Ct.

because this case in [sic] not materially distinguishable from the "ordinary" case in which a subsequent change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 397 F.3d 334, 335-36 (5th Cir.2005) (internal footnotes omitted). *See also Morris v. Horn*, 187 F.3d 333, 341-42 (3rd Cir.1999). Admittedly, there are cases holding that a particular change in the law created an "exceptional circumstance" warranting Rule 60(b)(6) review. *E.g.*, *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2nd Cir.2004) (change in deportation law). However, it is inappropriate for us to address whether *Crawford* requires a different result in this case when Appellant has not claimed that it does.

JOHNSTONE, J., joins this opinion.

KELLER, Justice, dissenting.

I respectfully dissent, primarily for the reasons expressed in my dissent in Taylor's second appeal of his conviction and death sentence.¹ Though I do not wish to engage in an extended analysis again, I must point out that the trial court committed an error of constitutional magnitude when it allowed George Wade's statement to be introduced into evidence. The Supreme Court of the United States recognized this error when it overruled *Ohio v. Roberts*² and cited our opinion in Taylor's second appeal as an example of "[t]he unpardonable vice of . . . *Roberts* . . . [i.e.,] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."³ We also recognized this error when we noted that *Crawford* "remov[ed] any remaining underpinning for the admission of such evidence in *Taylor*."⁴

Given the magnitude of Wade's testimony, which was the only evidence that identified Taylor as the shooter in these murders, it is inconceivable that we could label its introduction as harmless error. By refusing to reverse Taylor's

Page 80

1239, 155 L.Ed.2d 247 (2003)] held that local governments are "persons" amenable to *qui tam* actions under the FCA. Following the Supreme Court's decision in *Chandler*, the plaintiffs filed a motion in the district court for relief under Rule 60(b)(6) from this court's final judgment in *Garibaldi I*. The district court concluded that *Chandler* had overruled *Garibaldi I*, granted plaintiffs' motion, and re-entered its judgment on the verdict for the plaintiffs against the school board. The school board appealed. We reverse. In the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6). The circumstances here are not "extraordinary"

conviction a *third* time, however, we are simply allowing this blatant error to stand, perhaps in the hope that the federal courts will address the issue. While I have no doubt that they will, and that they should, we do

Page 81

not need to wait for the federal courts to provide maid service to clean up the mess created by our flawed evidentiary ruling, especially when this case is already over fifteen years stale. We perform an additional disservice to both the Commonwealth and Appellant by adding further to the staleness and possible loss of the evidence when we once again ignore the law and fail to reverse and remand for a new trial at this time.

Notes:

1. See *Taylor v. Commonwealth*, 63 S.W.3d 151, 168 (Ky.2001) (Keller, J., dissenting).
 2. 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).
 3. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); see also *Terry v. Commonwealth*, 153 S.W.3d 794, 800 (Ky.2005) ("The [United States Supreme] Court specifically identified *Taylor II* as an example of the type of error attributable to *Roberts*").
 4. *Terry*, 153 S.W.3d at 800; *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky.2004) (recognizing that *Crawford* abrogated our decision in *Taylor v. Commonwealth*, 63 S.W.3d 151 (Ky.2001) as to this issue).
-

63 S.W.3d 151
Supreme Court of Kentucky.

Victor Dewayne TAYLOR, Appellant,
v.
COMMONWEALTH OF
KENTUCKY, Appellant.

No. 1998-SC-0355-MR.

Oct. 25, 2001.

As Modified on Denial of Rehearing Nov. 14, 2001.

Synopsis

Defendant was convicted in the Circuit Court, Fayette County, William E. McAnulty, Jr., J., of two counts of murder, kidnapping, and first-degree robbery, and one count of first-degree sodomy, and was sentenced to death on each of the murder and kidnapping charges, and to consecutive 20-year terms on remaining charges. Defendant appealed. The Supreme Court, Wintersheimer, J., 821 S.W.2d 72, affirmed defendant's convictions and vacated death sentences on kidnapping charges. Defendant moved to set aside remaining judgments. The Circuit Court, Bullitt County, Thomas L. Waller, Special Judge, denied motion, and defendant appealed. The Supreme Court, Johnstone, J., held that: (1) defendant's claim of racial discrimination in state's exercise of peremptory challenges was procedurally barred; (2) defendant failed to establish prima facie case of racial discrimination in state's exercise of peremptory challenges; (3) state did not violate its duty to disclose exculpatory evidence; (4) state's reliance on testimony of witness who manifested mental and emotional problems after trial did not equate to knowing use of perjured testimony; (5) defense counsel did not provide ineffective assistance; (6) proffered mitigating testimony of priest was inadmissible during penalty phase; (7) jurors should not have been allowed to testify concerning deliberations at hearing on motion; and (8) confession of defendant's accomplice was admissible at defendant's trial as having sufficient particularized guarantees of trustworthiness.

Affirmed.

Keller, J., dissented with opinion in which Stumbo, J., joined.

Stumbo, J., dissented with opinion.

Attorneys and Law Firms

*155 Thomas M. Ransdell, Assistant Public Advocate, Department of Public Advocacy, Frankfort, Margaret F. Case, Department of Public Advocacy, Stanford, Counsel for Appellant.

A.B. Chandler III, Attorney General of Kentucky, Janet M. Graham, Michael G. Wilson, Assistant Attorneys General, Criminal Appellate Division, Office of the Attorney General, Frankfort, Counsel for Appellee.

Opinion

JOHNSTONE, Justice.

Appellant, Victor Dewayne Taylor, was convicted of two counts of first-degree murder, two counts of first-degree kidnapping, two counts of first-degree sodomy, and one count of first-degree robbery in connection with the murder of two teenage boys. He was sentenced to death on each of the murder and kidnapping charges and twenty years' imprisonment on each of the other charges, with the sentences to be run consecutively. His conviction was affirmed on direct appeal. *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1990), *cert. denied*, *156 502 U.S. 1100, 112 S.Ct. 1185, 117 L.Ed.2d 428 and *cert. denied*, 502 U.S. 1121, 112 S.Ct. 1243, 117 L.Ed.2d 475 (1992). However, we vacated the two death sentences on the kidnapping charges on grounds that those sentences violated the U.S. and Kentucky constitutional provisions against double jeopardy. *Id.* at 77. Subsequently, Taylor filed a RCr 11.42 motion to set aside the remaining judgments against him. After an evidentiary hearing, the trial court entered an order denying the motion. Taylor appeals that ruling to this Court as a matter of right. For the reasons set forth below, we affirm the trial court.

EXCLUSION OF AFRICAN-AMERICAN JURORS

At the evidentiary hearing, Taylor placed into evidence testimony and material concerning his claim that the office of the Jefferson County Commonwealth's Attorney had a pattern and practice of systematically striking African-Americans from the jury venire. Taylor argued that this conduct violated his right to equal protection under the Fourteenth Amendment as held in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). However, *Swain* was overruled by

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Further, *Batson* applied retroactively to Taylor's case because his case was still pending review in this Court when *Batson* was decided and, consequently, was "not yet final" within the meaning of *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649, 661 (1987). Therefore, *Batson*, not *Swain*, applies to Taylor's case.

Swain holds that a "State's purposeful or deliberate denial" to African-Americans of the opportunity to serve as jurors solely because of race violates the right to equal protection under the Fourteenth Amendment. *Swain*, 380 U.S. at 203–04, 85 S.Ct. at 826–27, 13 L.Ed.2d at 763. To show a prima facie case under *Swain*, a criminal appellant has to show "through direct or indirect evidence, such as testimony or statistical proof, that the prosecutor had a systematic and intentional practice of excluding blacks from petit juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in [the appellant's] trial." *Love v. Jones*, 923 F.2d 816, 818 (1991). *Batson* overruled that portion of *Swain* that sets forth the necessary evidentiary showing needed to establish a prima facie case of racial discrimination.

The *Batson* Court held that a defendant "may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. To establish a prima facie case under *Batson*, a defendant has to show that he is a "member of a cognizable racial group," that the prosecutor exercised "peremptory challenges to remove from the venire members of the defendant's race,"¹ and that those "facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.*, 106 S.Ct. at 1723, 90 L.Ed.2d at 87–88 (emphasis added). Upon making out a prima facie case, the burden shifts to the prosecutor to come forward with a race-neutral explanation for the challenged peremptory strikes. *Id.* at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

¹ We note that we are aware that subsequent cases interpreting *Batson* have altered these two requirements. We are not holding otherwise in this opinion.

*157 The *Batson* Court noted that lower courts had interpreted *Swain* as placing a "crippling burden of proof" which had effectively rendered a prosecutor's peremptory challenges immune from constitutional scrutiny. *Id.* at 92–

93, 106 S.Ct. at 1720–21, 90 L.Ed.2d at 84–85. Thus, *Batson* overruled *Swain* in order to remove this disability on a defendant's constitutional challenge to a prosecutor's peremptory challenges. Nonetheless, Taylor claims error under *Swain* and its "crippling burden of proof" rather than *Batson* because he alleged a *Batson* violation on direct appeal. The issue was decided against Taylor on direct appeal and, therefore, cannot be raised in his RCr 11.42 motion. See *Thacker v. Commonwealth*, Ky., 476 S.W.2d 838, 839 (1972), which holds, "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." The *Swain* claim is an attempt to get around this long-established rule. Even if we were to hold that *Swain* and not *Batson* was controlling, Taylor's claim would still fail for the same reason his *Batson* claim failed on direct appeal.

The evidence presented by Taylor at the evidentiary hearing focused on the first part of his burden under *Swain*, i.e., whether the prosecutor's office had a systematic and intentional practice of excluding blacks from juries in criminal trials. But he presented no evidence that this practice "continued unabated" at his trial. In addition to a prosecutor's exclusion of minority members from the venire via peremptory strikes, *Batson* also requires—to establish a prima facie case—a showing of "other relevant circumstances" that create an inference that the prosecutor struck the jurors on the basis of their race. *Commonwealth v. Hardy*, Ky., 775 S.W.2d 919, 920 (1989). In the case at bar, there was no showing of other relevant circumstances at the time defense counsel objected to the seating of the jury and no such argument on this point was made on direct appeal. Moreover, the trial court specifically noted that there was no evidence that African-Americans were systematically excluded from the venire. *Notice of Death Sentence Review* at 9, *Commonwealth v. Taylor*, 84–CR–1549 (Jefferson Circuit Court entered June 3, 1986). Therefore, since a prima facie case was not made under *Batson*, it certainly was not made under the much more restrictive holding of *Swain*.

ALLEGED BRADY VIOLATIONS

Taylor alleges that the prosecution failed to disclose exculpatory information to the defense in violation of its duty to do so under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We address separately each alleged violation below because of the discrete and independent

nature of each claim. We are aware that the materiality of evidence withheld by the prosecution is to be considered cumulatively and not item-by-item, *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 507 (1995), and apply that standard below.

1. FAILURE TO DISCLOSE REWARD OFFER

Taylor argues that the Commonwealth failed to disclose that two of the witnesses against him, Cecil Pepper and Dino Pace, had been offered a reward of \$12,100 if a conviction was obtained against Taylor. The Commonwealth argues that the defense was aware of this reward offer and, thus, there was no failure to disclose the information. We agree with the Commonwealth.

*158 A general reward of \$12,000 for “information leading to the arrest and conviction of the boys’ killer” was offered by Harvey Sloane, who was the Mayor of Louisville at the time. The “boys” referred to were the two teenage boys Taylor was ultimately convicted of kidnapping and murdering. Information regarding the reward was publicized in the media and was public knowledge. In fact, defense counsel noted the reward in an attachment to Taylor’s motion for a change of venue. Thus, this information was not withheld from the defense and was available to the defense for impeachment purposes at trial.

There was no *Brady* violation with respect to the offer of a \$12,000 reward.

2. FAILURE TO DISCLOSE THAT A WITNESS HAD BEEN RED-LINED

Next, Taylor argues that the Commonwealth failed to reveal that Cecil Pepper, who identified Taylor at trial, had been red-lined, a local procedure formerly employed by Jefferson District Court Judges to restrict the number of warrants one person may swear out against another. Its purpose was to curb abuse of the warrant procedure. While only a district judge could red-line an individual, Taylor points out that the Jefferson County Attorney’s Office had access to records concerning red-lining. Taylor argues that this was valuable impeachment evidence that could have seriously undermined the credibility of Pepper’s testimony. Among other arguments, the Commonwealth states that there was no proof that the prosecution knew that Pepper had been red-lined. Again, we agree with the Commonwealth.

There is nothing in the record to indicate that the Commonwealth was aware that Pepper had been red-lined. Nor can that knowledge be imputed upon the Commonwealth. The *Brady* rule “encompasses evidence known only to police investigators and not to the prosecutor. In order to comply with *Brady*; therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” *Strickler v. Greene*, 527 U.S. 263, 280–81, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286, 301 (1999) (internal citations and quotation marks omitted). The district courts are part of the judicial branch of the Commonwealth’s government, whereas the Commonwealth Attorney and the County Attorney belong to the executive branch. Therefore, information known to the district court cannot be imputed to the Commonwealth Attorney who prosecuted this case.

There was no *Brady* violation with respect to the red-lining of Cecil Pepper.

3. FAILURE TO DISCLOSE MENTAL INQUEST WARRANT HAD BEEN ISSUED FOR A WITNESS

Next, Taylor argues that the Commonwealth failed to disclose that Cecil Pepper had been arrested on a mental inquest warrant five months after Taylor had been arrested. Taylor argues that this evidence of mental illness could have affected Pepper’s credibility and, therefore, should have been disclosed under the *Brady* rule. The Commonwealth argues that the evidence was not admissible and, thus, no violation occurred.

Under the *Brady* rule, the prosecution has a duty to disclose evidence concerning the credibility of a witness when the reliability of that witness “may well be determinative of guilt or innocence....” *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 109 (1972). The question then becomes whether the mental inquest evidence meets this criteria.

*159 Pepper’s arrest on a mental inquest warrant would not in and of itself be admissible at trial. Apparently, the warrant was sworn out by a police officer. The officer’s lay opinion as to Pepper’s mental state clearly would not have been admissible. Citing to *Bartholomew v. Wood*, 34 F.3d 870 (9th Cir.1994) (per curiam), Taylor argues that the “question is not whether exculpatory evidence is independently admissible, but whether it would lead to the discovery of admissible evidence.” He then argues that knowledge of Pepper’s arrest

on a mental inquest warrant would have led to admissible evidence concerning Pepper's mental state. We disagree.

The U.S. Supreme Court overruled the very case cited by Taylor on the very same point in *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995). At issue in *Wood* was whether the prosecution violated the *Brady* rule by failing to disclose the results of polygraph examinations given to two of the witnesses against the appellant at trial. *Id.* at 4–5, 116 S.Ct. at 9–10, 133 L.Ed.2d at 6. The *Wood* Court reasoned that there had been no violation:

The information at issue here, then—the results of a polygraph examination of one of the witnesses—is not “evidence” at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses. To get around this problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized. Other than expressing a belief that in a deposition [the witness] might have confessed to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—the Court of Appeals did not specify what particular evidence it had in mind. Its judgment is based on mere speculation, in violation of the standards we have established.

Id. at 6, 116 S.Ct. at 10, 133 L.Ed.2d at 7.

While *Wood* does not hold that disclosure of inadmissible evidence is never required under the *Brady* rule, the opinion makes clear that there can only be a violation when there is a “reasonable probability” that disclosure of the inadmissible evidence would have resulted in a different outcome at trial. *Id.* at 8, 116 S.Ct. at 11, 133 L.Ed.2d at 8. In the case at bar, the nondisclosure of the mental inquest warrant does not meet this standard.

Even if disclosure of the mental inquest warrant may have put the defense on notice to closely examine the issue of Pepper's mental state, there is nothing in the record to indicate that there exists or existed any *admissible* evidence on this issue. For evidence of Pepper's mental state to be relevant to his credibility, Taylor must “demonstrate[] that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified

about.” *Commonwealth v. Huber*, Ky., 711 S.W.2d 490, 491 (1986). No such demonstration had been made in this case.

There was no *Brady* violation with respect to the mental inquest warrant for Cecil Pepper.

4. FAILURE TO DISCLOSE A WITNESS'S HISTORY OF MENTAL ILLNESS

Taylor argues that the prosecution failed to disclose the mental history of Jeffery Brown, who testified against Taylor at trial. This argument fails for the *160 same reason the argument that failure to disclose the mental inquest warrant for Pepper fails. Additionally, the argument is vague and conclusory.

5. USE OF UNRELIABLE TESTIMONY

Taylor argues that Beverly Shackelford's testimony was totally unreliable because she had a history of mental illness and her testimony was contradictory to the “known facts” of the case. Taylor equates this to the knowing use of perjured testimony. We disagree.

First of all, “questions of credibility and weight of the evidence are jury matters.” *Estep v. Commonwealth*, Ky., 957 S.W.2d 191, 193 (1997). Moreover, Shackelford's mental and emotional problems manifested themselves after Taylor's trial.

The Commonwealth breached no duty with respect to Shackelford's testimony.

6. THREAT OF PROSECUTION AGAINST A WITNESS

Finally, Taylor argues that the Commonwealth failed to reveal that it had threatened to prosecute a witness, Eugene Taylor, for Eugene's alleged connection with the murders at issue in this case, if Eugene did not testify against Taylor. The basis of this charge is a statement made by Eugene some eight years after Taylor's trial. Taylor presents no other evidence that such a threat was ever made; consequently, there is simply not a sufficient factual basis to reach the merits on this issue.

INEFFECTIVE ASSISTANCE OF COUNSEL

Taylor raises some twenty-four (24) different ineffective assistance of counsel claims. Some of these claims are simply a reformulation of claims that either were or could have been

raised on direct appeal and, therefore, are not appropriately raised in a RCr 11.42 motion. Other issues concern the failure to request instructions contrary to or unsupported by Kentucky or federal law.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard of review for an ineffective assistance of counsel claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. To show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome." *Id.* at 695, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Finally, there exists a strong presumption that counsel's performance was effective. *Id.* at 690, 104 S.Ct. at 2052, 80 L.Ed.2d at 694. We apply the *Strickland* standard to the ineffective assistance of counsel claims addressed below.

1. ISSUES RAISED AND RESOLVED ON DIRECT APPEAL

Taylor raised forty-four (44) issues on direct appeal. We directly addressed only a select few of these issues in that opinion. The rest we cursorily dismissed by stating: "Allegations of error which we consider to be without merit will *161 not be addressed here." *Taylor*, 821 S.W.2d at 74. Even though some issues were not specifically addressed on direct appeal, they were all considered and resolved against Taylor. See *Commonwealth Transportation Cabinet Department of Highways v. Taub*, Ky., 766 S.W.2d 49, 51–52 (1988). Taylor tries to circumvent this well-settled rule by glossing errors already raised as claims of ineffective assistance of counsel. These issues include:

a. Failure to Make a Timely Request for a Change of Venue

Taylor argues that his attorneys were ineffective for failing to make a timely request for a second change of venue. On direct appeal, we noted that the trial court did not abuse its

discretion in denying the motion because the defense did not give reasonable notice. *Taylor*, 821 S.W.2d at 76. But we also noted that the trial court kept the issue open should need arise to revisit the issue and, further, that the trial court had little trouble seating an unbiased jury. *Id.* at 76–77.

b. Failure to Request Additional Psychological Testing

As required by statute and due process, a competency hearing was held to determine if Taylor was competent to stand trial. Three experts testified on the issue at the hearing, and Taylor was found competent to stand trial. The issue of Taylor's competency was raised and rejected on direct appeal. *Appellant's Brief* at 92–97, *Taylor*, *supra*.

c. Failure to Object to Prosecutor's Closing Remarks

The issue of the appropriateness of the prosecutor's closing remarks was raised and rejected on direct appeal. *Appellant's Brief* at 83–84, *Taylor*, *supra*.

2. CLAIMS NOT SUPPORTED BY LAW

Taylor raises a number of ineffective assistance of counsel claims that involve the failure to request instructions. Because these claims are contrary to or unsupported by Kentucky or federal law, we therefore reject them. These claims include: (i) failure to request an instruction limiting the jury's consideration of aggravating circumstances to only those enumerated in the instructions; (ii) failure to request an instruction that the jury's findings on mitigation evidence do not have to be unanimous; (iii) failure to request an instruction that the jury must find that the aggravating circumstances outweigh the mitigating circumstances before the death penalty could be imposed; (iv) failure to request an instruction defining reasonable doubt; (v) failure to request an instruction that the jury must begin its deliberations with the presumptions that life imprisonment is the appropriate penalty; (vi) failure to request an instruction that a decision to impose the death penalty should be a moral judgment in light of all available evidence; (vii) failure to request an instruction that would require the jury to presume that a life sentence would be served in its entirety; (viii) failure to request an instruction that would require the jury to presume that if he were sentenced to die, Taylor would be electrocuted; (ix) failure to request an instruction that would require the jury to return a sentence of less than death if any juror disagreed as to the appropriateness of the death penalty; and (x) failure to request an instruction to disregard the possibility of parole.

These claims are unsupported by state or federal law and will be considered no further.

3. FAILURE TO INTRODUCE MITIGATING EVIDENCE

*162 Taylor presents a list of mitigating evidence that he argues should have been presented during the penalty phase of his trial. He claims that his counsel was ineffective for either not presenting the evidence or failing to discover it in the first place. In support of this argument, he cites to a long list of cases that hold that failure to investigate and present mitigating evidence is reversible error. But these cases concern the complete failure to either investigate mitigating evidence or to present available mitigating evidence, or both. Such is not the case here where defense counsel did introduce the favorable testimony of numerous witnesses in support of mitigation. Thus, Taylor's argument is basically that defense counsel did not put on enough or all of the available mitigation evidence.

Defense counsel is not required to place all available mitigating circumstances into evidence. *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.), *cert. denied*, 516 U.S. 856, 116 S.Ct. 160, 133 L.Ed.2d 103 (1995). The mitigation evidence presented on Taylor's behalf included testimony concerning his mental state, his background, his family history, his time spent in foster homes, the physical and mental abuse inflicted upon him by his parents, and his distrust of people and institutions.

There was no ineffective assistance of counsel concerning the quantity and quality of mitigating evidence presented during the penalty phase of Taylor's trial.

4. FAILURE TO TIMELY DISCLOSE SOCIAL SERVICE REPORTS TO THE COMMONWEALTH

The defense called Father William Medley to present mitigating evidence during the penalty phase of Taylor's trial. Defense counsel sought to elicit testimony from Father Medley concerning Taylor's social history. The Commonwealth objected on grounds that Father Medley's testimony was based on social reports that were not disclosed to the Commonwealth during reciprocal discovery. The trial court sustained the objection. Taylor argues that his defense counsel was ineffective for not making the required disclosure. As a result, Taylor claims that the jury was deprived of hearing powerful mitigating evidence concerning his family background, which was placed into the record by avowal.

The avowal testimony based on the social service reports—which were not prepared by Father Medley—was classic hearsay. Taylor has made no argument that the testimony was admissible pursuant to an exception to the hearsay rule. Thus, the avowal testimony was not admissible and, therefore, the failure to produce the reports could not have resulted in ineffective assistance. *See Stanford v. Commonwealth, Ky.*, 854 S.W.2d 742, 748 (1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Further, the evidence was mostly cumulative to the testimony of Taylor's sister, which was admitted during the penalty phase of Taylor's trial. Finally, as explained above, defense counsel was not ineffective in the presentation of mitigating evidence at the penalty phase of Taylor's trial.

There was no ineffective assistance of counsel concerning the failure to produce the social service reports during discovery.

5. MISQUOTING THE BIBLE

The following exchange occurred between defense counsel and a prosecution witness who had been incarcerated with Taylor:

Q. You gained his confidence.... You held yourself out to help him. And then you dumped him in to save yourself fifteen years, right?

A. Yes.

*163 Q. You got a pretty good deal on that robbery, didn't you?

A. Yes, sir.

Q. A real good deal, right? I mean Judas only got twenty pieces of silver for betraying Christ, didn't he?

Taylor argues that he was prejudiced by this last remark when the prosecutor pointed out to the jury that Judas betrayed Christ for *thirty* pieces of silver and not twenty. Taylor claims that this biblical misquote made the defense look like "a bunch of heathens." The argument is without merit and borders on being sanctionable for its frivolity.

6. FAILURE TO OBJECT TO INTRODUCTION OF EVIDENCE

The prosecution introduced four hollow-point, .357 magnum shells that were found in a dresser in the house of Taylor's sister, which was where Taylor was living at the time of

the murders. While this was the same type of ammunition used to kill the two boys, Taylor argues that the bullets were not relevant because there was no evidence introduced that linked these bullets to either the crime itself or to Taylor. He then argues that his defense counsel was ineffective for failing to object to the introduction of this evidence. The Commonwealth argues that the evidence was admissible and that it was defense counsels' trial strategy to not object to the evidence.

It appears from a thorough review of the record that it was trial strategy not to object to the introduction of the bullet evidence. Defense counsel made a strong argument during closing that the evidence was not relevant and used that fact to discredit the Commonwealth's case. Clearly, defense counsel knew that the relevance of the bullet evidence was weak and used this fact in Taylor's favor.

Next, Taylor argues that defense counsel was ineffective for failing to move to exclude evidence of insect and rat mutilation during Dr. George Nichols' testimony. Again, we disagree.

Dr. Nichols performed the autopsies on the two murdered boys. While testifying concerning the autopsy of one of the boys, the following exchange occurred between the Commonwealth's Attorney and Dr. Nichols:

Q. Were there any other deformities noted on the body, sir?

A. Well, an insect deformity was, indeed, present on the skin of the upper abdomen, which was felt to be post mortem and felt to be of the garden variety, either an ant or cockroach.

Shortly after the above exchange, the Commonwealth's Attorney moved to admit certain post-mortem photographs of the boys. Defense counsel objected. At the bench conference concerning the objection, defense counsel also moved to exclude any evidence of "post-mortem insect trauma and post-mortem rodent trauma" during Dr. Nichols' testimony concerning his autopsy of the other murdered boy. This motion was granted. Thus, Taylor's ineffective assistance argument is that trial counsel should have objected to the above-outlined testimony by Dr. Nichols.

First of all, Dr. Nichols' reference to insect trauma was brief and cursory. More importantly, the testimony came in response not to a direct question about insect trauma, but rather, it came in response to a general question about "other

deformities." There is no indication that defense counsel should have anticipated Dr. Nichols' exact response to this question. Further, after the response was made, the most likely relief at that point would have been an admonishment from the trial court. Trial counsel may have *164 well felt that an admonishment would have only served to focus the jury's attention on the issue.

There was no ineffective assistance of counsel concerning the failure to object to either the introduction of the bullet evidence or to Dr. Nichols' testimony concerning insect trauma.

7. FAILURE TO EFFECTIVELY CROSS-EXAMINE WITNESS

Some background information is necessary to understand this argument. Taylor and George Wade were both indicted for the murders for which Taylor stands convicted. The trials were severed. Wade was tried first, found guilty, and sentenced to life imprisonment. Before he was arrested, Wade was questioned by the police. In the course of being questioned, he confessed to the crimes. His confession was introduced at Taylor's trial under an exception to the hearsay rule. *Taylor*, 821 S.W.2d at 74. In the confession, Wade identified Taylor as the triggerman.

Detective Leslie Wilson testified for the Commonwealth at both Taylor's trial and Wade's trial. Taylor argues that, if properly questioned, Detective Wilson would have testified that—during the police questioning of Wade—he told Wade that police had heard on the street that Wade was present at the shootings, but that Taylor had pulled the trigger. This, Taylor argues, would have impeached or discredited Wade's confession by explaining how Wade came to implicate Taylor as the triggerman. The Commonwealth argues that this was trial strategy and that similar evidence was admitted through the cross-examination of another witness. We agree.

The defense made a motion in limine to exclude any reference to evidence gathered "on the street." The trial court granted the motion. Wilson's testimony at Wade's trial was that the police were hearing "on the street" that Wade and Taylor committed the murders and that Taylor was the triggerman. Thus, presumably Wilson's testimony on this point at Taylor's trial would have been similar and could have opened the door to evidence gathered "on the street." This would have undermined existing trial strategy. Further, defense counsel did cross-examine a Detective Duff about whether

Detective Wilson “fed” Taylor’s name to Wade during police questioning of Wade.

There was no ineffective assistance of counsel concerning the cross-examination of Detective Wilson.

8. FAILURE TO POINT OUT TO THE JURY THAT TAYLOR WAS NOT IDENTIFIED IN A LINEUP

Dino Pace, an identification witness, failed to identify Taylor in a photo pack lineup. Further, the police never placed Taylor in an in-person lineup for identification by either Pace or Cecil Pepper, who was another identification witness. We have reviewed defense counsel’s cross-examination of these witnesses and defense counsel’s closing argument. Defense counsel vigorously attacked the reliability of Pace’s and Pepper’s identification of Taylor. Apparently, Taylor’s argument is that defense counsel was ineffective for specifically failing to ask Pace whether he had been able to identify Taylor in the photo pack. In light of what the defense did do to attack the reliability of Pepper’s identification, what little it failed to do does not come even close to rising to the level of ineffective assistance of counsel.

9. FAILURE TO REQUEST A MISSING EVIDENCE INSTRUCTION

Inexplicably, the two murdered boys’ underwear disappeared and was never located. Defense counsel moved to dismiss the sodomy charges against Taylor because *165 “the loss of the undershorts of the victims not only results in the loss of material evidence to which the defendant had a right to have tested, but also means the loss of potentially exculpatory evidence.” The trial court denied the motion. Subsequently, defense counsel did not request a missing-evidence instruction based on the missing underwear. Taylor argues that this failure resulted in ineffective assistance of counsel.

At first blush, it appears that Taylor would have been entitled to a missing evidence instruction if defense counsel had moved for one. See *Collins v. Commonwealth*, Ky., 951 S.W.2d 569, 573 (1997). Such an instruction would have informed the jury that it could, but was not required to, infer that the underwear evidence if available would have been favorable to Taylor. But Taylor was tried in 1986. *Collins* was rendered in 1997. The use of a missing-evidence instruction was first approved of in 1988 in *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 539 (1988). Thus, there was no Kentucky authority for allowing the use of

a missing-evidence instruction at the time of Taylor’s trial. Failure to anticipate changes in the law cannot constitute ineffective assistance of counsel. *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905, 913 (1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999). Further, even if failure to request the instruction was error, the effect of such an instruction on the jury in this case is pure speculation.

The jury may or may not have made the inference allowed by the instruction. Even if it had, it still could have found Taylor guilty of sodomy. In light of the totality of evidence presented against Taylor, we cannot say that there exists a reasonable probability that the jury’s verdict would have been different.

10. OTHER CLAIMS OF INEFFECTIVE ASSISTANCE

Finally, Taylor makes a number of claims of various failure on the part of defense counsel that are so trivial, so contrary to the record, or so without foundation that they do not merit separate analysis. These errors include: (i) failure to point out that the police did not investigate Wade’s girlfriend’s residence; (ii) failure to cross-examine Cecil Pepper regarding contradictory statements he allegedly made to the police; (iii) failure to raise the staleness of the information in affidavits used to provide probable cause for search warrants; (iv) failure to point out that hair and acid phosphates evidence came from two different shirts; (v) failure to effectively cross-examine Beverly Shackelford; (vi) failure to uncover that Ira Brown—a witness against Taylor—was collecting newspaper articles about the murders before Taylor was arrested; (vii) failure to preserve the issue that electrocution violates the Eighth Amendment to the U.S. Constitution; and (viii) failure to object to placing Taylor in shackles after his emotional outburst during the penalty phase of his trial.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Taylor raises a number of claims of ineffective assistance of appellate counsel claims. Such claims cannot be raised in a RCr 11.42 motion. *Harper v. Commonwealth*, Ky., 978 S.W.2d 311, 318 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999). Therefore, these claims will not be considered.

BIASED TRIAL JUDGE

Taylor argues that the trial judge prematurely decided that the death penalty was the appropriate punishment in this *166 case. Taylor bases this argument on the testimony—at the evidentiary hearing on his RCr 11.42 motion—of a single juror who sat on his case. She testified that, after the verdicts had been rendered, the trial judge stated to the jury that it had done “the right thing” by returning a recommendation for death. This was not corroborated by any other evidence. The trial judge did not testify at the RCr 11.42 hearing. The evidence of bias is woefully insufficient to set aside Taylor’s sentence, especially in view of the evenhandedness demonstrated by the trial judge throughout the trial.

IMPROPER CONSIDERATION OF EXTRANEOUS FACTORS BY THE JURY

Taylor argues that the jury improperly considered the possibility of parole during sentencing deliberations. Further, he argues that certain jurors prayed before casting their votes on sentencing. These arguments are based on the testimony—at the evidentiary hearing on his RCr 11.42 motion—of some of the jurors who sat on his case. This testimony was improper and should not have been allowed. *Gall v. Commonwealth*, Ky., 702 S.W.2d 37, 44 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986); RCr 10.04.

RECONSIDERATION OF THE ADMISSIBILITY OF WADE’S CONFESSION

Finally, Taylor argues that we should reconsider the admissibility of Wade’s confession in light of the U.S. Supreme Court’s decision in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). For the reasons set forth below, we decline the invitation.

When a hearsay declarant is unavailable for cross-examination at a criminal trial, the hearsay statement is only admissible against the defendant under the Confrontation Clause if it “bears adequate indicia of reliability.” *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 608 (1980). When a hearsay statement falls within a “firmly rooted” hearsay exception, reliability is assumed. *Id.* If the statement does not fall within a firmly rooted hearsay exception, reliability is not assumed and must be affirmatively shown by demonstrating that the statement has “particularized guarantees of trustworthiness.” *Id.* Further, to “be admissible under the Confrontation Clause, hearsay

evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Lilly, *supra*, is a plurality opinion in which four Justices held in the lead opinion that the statements against penal interest exception to the hearsay rule is not firmly rooted for Confrontation Clause purposes. *Lilly*, 527 U.S. at 134, 119 S.Ct. at 1900, 144 L.Ed.2d at 133. But, while casting doubt on the proposition, the plurality opinion did not foreclose the possibility that a particular statement against penal interest could be admitted pursuant to the second prong of *Roberts*, *supra*, i.e., that the statement still could be shown to “possess adequate indicia of reliability by virtue of its inherent trustworthiness.” *Id.* at 137–38, 119 S.Ct. at 1900–01, 144 L.Ed.2d at 134–35. In concurrence, three of the Justices—Chief Justice Rehnquist, Justice O’Connor and Justice Kennedy—would have reversed and remanded the case to the Supreme Court of Virginia for a determination of whether the confession at issue bore “particularized guarantees of trustworthiness” under *Roberts*. *167 *Id.* at 148, 119 S.Ct. at 1905, 144 L.Ed.2d at 141 (Rehnquist, C.J., concurring). The plurality opinion rejected this option because: (1) the Court granted certiorari on the issue of whether hearsay statements against penal interest are “firmly rooted” for Confrontation Clause purposes, and the issue was fully briefed by both parties; (2) the test of admissibility employed by the Virginia Supreme Court was “virtually identical to the *Roberts* ‘particularized guarantees’ test, which turns as well on the ‘surrounding circumstances’ of the statements”; and (3) no argument was made that there were other relevant circumstances left for the Virginia Supreme Court to consider. *Id.* at 135 n. 6, 119 S.Ct. at 1899 n. 66, 144 L.Ed.2d at 134 n. 6.

It is not clear to what extent, if any, *Lilly* changes the law. As a plurality opinion, it is not binding precedent on the issue of whether statements against penal interests are “firmly rooted” for Confrontation Clause purposes. *See Texas v. Brown*, 460 U.S. 730, 737, 103 S.Ct. 1535, 1541, 75 L.Ed.2d 502, 510–11 (1983); *see also Gabow v. Commonwealth*, 34 S.W.3d 63, 78 (2000), petition for cert. filed, April 25, 2001. Moreover, in *Taylor* we did not hold that the statements against penal interest exception to the hearsay rule was “firmly rooted” for Confrontation Clause purposes. Rather, we held that Wade’s confession was properly admitted as a statement against penal interest pursuant to FRE 804(b)(3), which we adopted as a rule of evidence in this Commonwealth in *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978).

In determining that the confession was admissible against Taylor, we noted both: (1) the existence of corroborating evidence of Wade's confession, which is an evidentiary prerequisite to the admission of a statement against penal interest as an exception to the hearsay rule under FRE 804(b) (3) and *Crawley*, and (2) the circumstances surrounding the making of Wade's confession, which, under *Idaho v. Wright*, is a constitutional requirement to the admission of a hearsay statement that does not fall within a firmly rooted exception to the hearsay rule. *Taylor*, 821 S.W.2d at 74–75. In addition to holding that Wade's confession was properly admitted under the rules of evidence, we also held that its admission did not violate Taylor's constitutional rights.

On direct appeal, both the majority and dissenting opinions addressed and discussed Taylor's Confrontation Clause argument. *Taylor*, 821 S.W.2d at 75–76, 80–82. Thus, the issue of whether Wade's statement was admissible under the Kentucky and U.S. Constitutions was decided against Taylor on direct appeal. Therefore, given *Roberts* either/or two-prong approach to admissibility, *Taylor* should be read as holding that Wade's confession was admissible under the second prong of *Roberts*, rather than as a “firmly rooted” exception to the hearsay rule. Consequently, even if *Lilly* was binding precedent, *Lilly* would not *a fortiori* overrule *Taylor*.

Therefore, Taylor's argument is reduced to a plea that we reexamine an issue that was raised and decided against him on direct appeal. This is foreclosed by both the above-discussed rule set forth in *Thacker*, and the law of the case doctrine. Under the law of the case doctrine, “an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.” *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, Ky., 291 S.W.2d 539, 542 (1956). A rarely-employed exception to the law of the case doctrine exists when it can be shown that the former decision was clearly and palpably erroneous, but no such showing is made in this case. *Lilly* does not overrule or render *168 *Taylor* erroneous. Nor is it clearly apparent that *Taylor* reaches the wrong result under the applicable case law.

In conclusion, we note that any allegation of error not specifically addressed above has been considered and rejected as having no merit.

For the reasons set forth above, we affirm the trial court's ruling.

LAMBERT, C.J.; COOPER, GRAVES, and WINTERSHEIMER, JJ., concur.

KELLER, J., dissents by separate opinion, with STUMBO, J., joining that dissenting opinion.

STUMBO, J., dissents by separate opinion.

KELLER, Justice, Dissenting.

Today's majority opinion represents the *second* time this Court has allowed Taylor's conviction and death-sentence to stand despite “a paradigmatic Confrontation Clause violation.”¹ This Court clearly erred in *Taylor v. Commonwealth*² when it held that the trial court properly allowed the Commonwealth to introduce Taylor's co-defendant's statement as evidence against Taylor. The *Taylor I* Court's conclusion that Wade's statements were trustworthy and, therefore, admissible, rests upon its consideration of factors that the United States Supreme Court had rejected prior to Taylor's trial³ and factors rejected before *Taylor I* became final⁴ as well as an analysis of statements against penal interest that the Court has subsequently discredited.⁵ I agree, however, with just *169 one statement in the majority opinion's analysis of this issue—but not in the sense the majority intended—“*Lilly* does not ... render *Taylor* erroneous.”⁶ I agree with this statement because *Lilly* did not make *Taylor I* any “more wrong” than it was already; it merely confirmed what we already knew—*Taylor I* was wrong the day it was rendered, it is wrong today, and it will remain wrong tomorrow.

¹ *Lilly v. Virginia*, 527 U.S. 116 at 143, 119 S.Ct. 1887 at 1903, 144 L.Ed.2d 117 (1999) (Scalia, J. dissenting) (hereafter “*Lilly*”).

² Ky., 821 S.W.2d 72, 74–76 (1990) (hereafter “*Taylor I*”).

³ See *Taylor I*, *supra* note 2 at 74–75 (addressing voluntariness of co-defendant's statement: “He was Mirandized three times ... [h]is final waiver of rights was tape-recorded, reduced to writing and signed in the presence of two police officers.”). But see *Lee v. Illinois*, 476 U.S. 530, 544, 106 S.Ct. 2056, 90 L.Ed.2d 514, 528 (1986) (“Although ... the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or

impulse [declarant] might have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [defendant's] involvement" (emphasis added)).

4 See *Taylor I*, *supra* note 2 at 74 ("[T]he admissions against Taylor in Wade's statement were essentially consistent with ... the testimony of three other prosecution witnesses"); *Id.* at 75 ("The statement Wade gave to the police was corroborated in part by five different witnesses. Every material detail of Wade's confession was corroborated by independent testimony and physical evidence."); *Id.* ("Wade's confession was corroborated in every material detail by independent testimony and physical evidence."); *Id.* ("Wade was unavailable, his statement was against his own interest, and from the physical evidence, the testimony of witness [sic] and Wade's confession, it was reliable and trustworthy." (emphasis added)); *Id.* at 76 ("[W]hat may be unreliable in isolation may be probative when corroborated by other evidence."). But see *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638, 656–57 (1990) ("To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." (emphasis added)). See also *Taylor I* at 81 (Leibson, J. dissenting) (noting that Taylor cited the Court to *Idaho v. Wright* on petition for rehearing).

5 See *Taylor I*, *supra* note 2 at 75 ("[Wade's] confession was not any less a statement against his own penal interest simply because it also implicated Taylor.... The determination of whether an out of court statement is against the declarant's penal interest does not require an assessment of the declarant's subjective motivation."). But see *Williamson v. United States*, 512 U.S. 594, 599, 114 S.Ct. 2431, 129 L.Ed.2d 476, 482–83 (1994):

The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

... Self-exculpatory statements are *exactly* the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

... The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says *nothing at all* about the collateral statement's reliability.

Id. (emphasis added).

6 Majority Opinion at 63 S.W.3d 151, 167-168 (2001) (emphasis added).

The majority opinion makes no serious attempt to justify the holding in *Taylor I*, and instead "declines the invitation" to correct the error after concluding that the law of the case doctrine prevents this Court from revisiting its prior determination. Nothing could be further from the truth—this Court has repeatedly recognized that "the law of the case rule has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous."⁷ Our role as Justices of this Court is not so mechanical that we must pretend the Emperor is fully clothed when he stands stark naked before us, and our predecessor Court recognized that the law of the case doctrine does not stand in the way of fundamental justice:

7 *Gossett v. Commonwealth*, Ky., 441 S.W.2d 117, 118 (1969). See also *White v. Commonwealth*, Ky., 360 S.W.2d 198, 202 (1962) ("[W]e consider that the law of the case rule has sufficient flexibility to permit us to admit and correct our error, particularly where substantial injustice might otherwise result.")

Notwithstanding the firmness of this rule in general, a number of courts have maintained and held that the rule is not inflexible but is subject to exception, although the exception must be rare and the former decision must appear to be clearly and palpably erroneous. *In such a case it is deemed to be the duty of the court to admit its error rather than to sanction an unjust result* and "deny to litigants and ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case." ...

...

... [T]hese cases reflect an accelerating trend to make an exception to the general rule where it clearly appears that the result of the error to be cured outweighs any harm that may be done in the particular case

The Court should look to the effect of its own error rather than merely acknowledge that error was committed and let it go at that. *It should wipe out the effect of the mistake in the first opinion rather than perpetuate the error which would otherwise result in a great wrong to the*

litigant and establish a bad precedent. *That is essential justice.*⁸

⁸ *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, Ky., 291 S.W.2d 539, 542–3 (1956) (emphasis added and citation omitted).

*170 The law of the case doctrine, unlike res judicata, “is not an inexorable command, or a constitutional requirement, but is, rather, a *discretionary policy* which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so.”⁹ The United States Supreme Court has emphasized that courts have the discretion to follow a prior ruling as law of the case: “The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res judicata; one directs discussion, the other supersedes it and compels judgment ... in one it is a question of power, in the other of submission.”¹⁰

⁹ 5 Am.Jur.2d (Appellate Review) § 605 (emphasis added).

¹⁰ *Southern Railway Co. v. Clift*, 260 U.S. 316, 319, 43 S.Ct. 126, 67 L.Ed. 283, 284 (1922).

While I recognize the desire “to prevent vexatiously long litigation and indefinite postponement of final judgment,”¹¹ hopefully—surely—the majority does not value finality more importantly than ensuring a constitutionally fair trial when a human life is at stake.

¹¹ *Gossett v. Commonwealth*, *supra* note 7 at 118.

In any event, “[t]he application of the rule must be viewed in the light of its purpose, and ... where extension of its effect will result in the very evil which its existence is intended to prevent ... [it] will not be applied.”¹² The egregious and palpable nature of this constitutional violation virtually guarantees that a future reviewing court will grant Taylor a new trial. In fact, all recent indications suggest that *this* Court, when confronted on direct appeal with a co-defendant's self-exculpatory statements which, like Wade's, lack any “particularized guarantees of trustworthiness,” will hold that the Confrontation Clause prohibits their introduction.¹³ By abdicating its responsibility to correct the error in *Taylor I*, today's majority needlessly prolongs this litigation and accomplishes only a hollow victory for finality. It is an unavoidable fact that, as time passes on, memories fade and witnesses become unavailable. *When* a future court grants Taylor a new trial, today's majority opinion's “legacy” will

be only further evidentiary staleness, and justice may then succumb to a want of proof.

¹² *Id.* at 118–119.

¹³ See *Murphy v. Commonwealth*, Ky., 50 S.W.3d 173, 183–4 (2001) (“[W]hile [the] confessions may fall under the hearsay exception for declarations against penal interest, KRE 804(b)(3), such exception has yet to be declared ‘firmly rooted.’ Finally, we cannot conclude that the confessions have sufficient ‘particularized guarantees of trustworthiness’ so as to render them admissible.” (citation omitted)). See also *Osborne v. Commonwealth*, Ky., 43 S.W.3d 234, 239–241 (2001) (“Pursuant to *Williamson*, each statement within the broader narrative must be examined individually to determine whether it is, in fact, self-inculpatory.”). Cf. *Gabow v. Commonwealth*, Ky., 34 S.W.3d 63, 75–80 (2000) (finding a co-defendant's statement admissible because it was self-inculpatory and possessed numerous indications of trustworthiness not present in *Taylor I*).

STUMBO, J., joins this dissenting opinion.

STUMBO, Justice, Dissenting.

Respectfully, I dissent from the majority opinion in this case on two of the issues decided therein. First, Taylor has made a *prima facie* case under both *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Next, I would reach the merits of Taylor's Confrontation *171 Clause with respect to the admission of Wade's confession.

Taylor produced very impressive evidence in support of his claim that the Commonwealth Attorney violated his right to equal protection of law by using peremptory strikes to remove African-American jurors from the jury venire solely on account of the jurors' race. The evidence presented included:

(1) Passages from the *Kentucky Prosecutor's Handbook* that stated that the following were not “preferable” jurors for the prosecution: (1) a juror who came from a “[m]inority group[] who may have a grudge against law enforcement;” and (2) a “juror of racial or national background to that of the defendant.”

(2) Observations by a then-sitting Jefferson Circuit Judge that she discharged a panel in a particular case because the Commonwealth Attorney used peremptory strikes to remove all black jurors on the venire and because of her “awareness

that the Commonwealth had in other prior cases also elected to utilize strikes to remove all blacks.”

(3) The testimony of a former Jefferson County public defender that he had observed a pattern and practice of the Commonwealth using peremptory strikes to remove blacks from jury venires.

(4) The testimony of a private attorney that he had observed the same pattern and practice on behalf of the Commonwealth in “dozens and dozens of murder cases, many of which had been tried capitally.”

(5) The testimony of a former staff attorney who worked for the Jefferson County Commonwealth Attorney, who testified that it was understood in the office that prosecutors should strive to strike jurors with the same ethnic background. Further, she testified that it was common knowledge that the same Commonwealth Attorney who prosecuted Taylor's case—who is also African-American—believed that blacks on the jury panel were bad.

The above evidence is of the same quantity and quality presented in *Love v. Jones*, 923 F.2d 816 (1991), which held that the defendant had made a prima facie case under *Swain*. Further, the Commonwealth used peremptory strikes to remove all but one African-American juror from the jury venire. Thus, the “practice continued unabated” at Taylor's trial. *Id.* at 818. A prima facie case is established when a party produces “enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.” *Black's Law Dictionary* (7th ed.1999). There is no doubt in my mind that Taylor produced enough evidence to allow the inference that the Commonwealth Attorney used peremptory strikes in this case to remove African-Americans from the jury venire solely on the basis of race. Next, I am frankly baffled by the majority's reliance on the fact that *Batson* overruled *Swain* to deny Taylor relief.

In overruling *Swain*, the *Batson* Court sought to remove a defendant's “crippling burden of proof” to establish an Equal Protection Clause violation under the evidentiary formulation set forth in cases interpreting *Swain*. *Batson*, 476 U.S. at 92, 106 S.Ct. at 1721–22, 90 L.Ed.2d at 85–86. To use *Batson* as a shield to prevent bringing Taylor's equal protection claim to light is a perversion of the spirit and intent of *Batson*. And, I would also note that precious little light indeed has been shed on this claim.

Taylor did raise a *Batson* claim on direct appeal. While that claim was necessarily rejected in the opinion affirming his conviction, there was absolutely no analysis of the claim. We are left in the dark as to why the claim was rejected. The majority opinion's assertion that Taylor's *Batson* *172 claim was rejected on direct appeal because he failed to establish a prima facie case is pure speculation.

In discussing what might constitute “other relevant circumstances” required to establish a prima facie case, *Batson* states clearly that a “‘pattern’ of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.” *Id.* at 96–97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. There was—as was argued by defense counsel in the objection to seating of the jury—a clear pattern of using peremptory strikes to remove African-Americans from the venire in Taylor's case. While I would hold that the evidence presented by Taylor in support of his *Swain* claim was sufficient in itself to establish a prima facie case under *Batson*—and that this alone should be grounds to revisit an important constitutional issue decided but never addressed on direct appeal—whether a prima facie case was established is of no consequence to the merits of Taylor's claim on this issue.

The establishment of a prima facie case does not entitle a defendant to relief under *Swain*. Rather, it shifts the burden on the government to put forth a race-neutral reason for its use of peremptory strikes. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *Jones*, 923 F.2d at 820. In this case, the Commonwealth Attorney did offer a reason for its use of peremptory strikes to remove African-American jurors from the venire, and that reason was anything but race-neutral.

In response to the defense's objection to the seating of the jury, the Commonwealth Attorney explained his reasons for his peremptory strikes: “In accordance with case law, the Commonwealth has no other rational reason—if I strike all [black jurors] it then becomes objectionable under the cases coming from ... California.” Further, the trial court's remarks in overruling the objection make clear that it did not accept this explanation as race-neutral: “I believe the issue being addressed at this time as to whether it is permissible to exercise your peremptory strikes whichever way you wish to. I don't know, but the record is clear as to what has been done in this case.” If anything, the remarks indicate that the trial court assumed that race-based strikes were permissible.

In my mind, once the prosecutor comes forth with an explanation for his or her use of peremptory strikes, the issue

of whether the defendant has established a prima facie case becomes moot. The establishment of a prima facie case only serves to shift the burden of proof to the government. Once the government assumes the burden of proof by proffering its reasons for its use of peremptory strikes, it must meet its burden. When the government's reasons do not establish a race-neutral basis for its strikes, the record reveals on its face a patent violation of a defendant's right to equal protection under both *Swain* and *Batson*.

Therefore, if the majority opinion is correct in its assertion that Taylor's *Batson* claim failed on direct appeal for failure to establish a prima facie case, then our error on direct appeal in affirming Taylor's conviction on this issue is clear and palpable. Further, the error resulted in a deprivation of Taylor's basic and fundamental right to equal protection under the law. *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, Ky., 291 S.W.2d 539, 542 (1956). For similar reasons, the law of the case doctrine should not bar Taylor's Confrontation Clause claim based on the substantive use of Wade's confession.

I see no reason to argue the majority opinion's assertion that *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), does not overrule *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1990). It just does not matter whether it does. Binding case law and precedent in force at the time of Taylor's trial clearly hold that introduction of Wade's uncross-examined confession violated Taylor's right under the Confrontation Clause.

In *Douglas v. Alabama* two defendants—Loyd and Douglas—were charged with murder and tried separately, 380 U.S. 415, 416, 85 S.Ct. 1074, 1075, 13 L.Ed.2d 934, 935–36 (1965). Loyd was tried first and convicted. Subsequently, the prosecutor—referred to in the opinion as the “Solicitor”—called Loyd to testify against Douglas at his trial. Loyd refused to testify on Fifth Amendment grounds. The trial court ruled that the privilege did not apply and permitted the prosecution to treat Loyd as a hostile witness. The Solicitor

then produced a document said to be a confession signed by Loyd. Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, “Did you make that statement?” Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read. The Solicitor then called three law enforcement officers who

identified the document as embodying a confession made and signed by Loyd. Although marked as an exhibit for identification, the document was not offered in evidence.

The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim.

Id. at 416–17, 85 S.Ct. at 1075–76, 13 L.Ed.2d at 936.

While the facts of *Douglas* are eerily similar to those of the case at bar, the results could not be more different. In reversing, the *Douglas* Court stated:

In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder. Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only *174 that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of

deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, on this record it appears that Loyd was acting entirely in his own interests in doing so. This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that "inferences from a witness refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.

Id. at 419–20, 85 S.Ct. at 1077, 13 L.Ed.2d at 937–38 (internal citations omitted).

We have relied on *Douglas* to reverse a number of convictions on facts similar to the case at bar. See e.g., *Higgs v. Commonwealth*, Ky., 554 S.W.2d 74, 75 (1977); *Lowe v. Commonwealth*, Ky., 487 S.W.2d 935, 936 (1972); see also *Owsley v. Commonwealth*, Ky., 458 S.W.2d 457, 463 (1970). These cases remain good law. Further, neither these cases nor *Douglas* were distinguished in the majority opinion on Taylor's direct appeal. Rather, we are left to assume that the admission of Wade's confession as a hearsay exception created a magic bullet that could pierce the heart of the Confrontation Clause but render it no harm.

The statement against penal interest exception to the hearsay rule was adopted by this Court in *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978). In *Crawley*, the appellant sought to admit a statement by a co-defendant, in which the co-defendant implicated someone other than appellant in the crimes charged. Thus, there was no potential Confrontation Clause concerns as to its admissibility. See *Lilly*, 527 U.S. at 130, 119 S.Ct. at 1897, 144 L.Ed.2d at 130. The majority opinion recognizes this fact when it argues that Taylor's

confession was not admitted as a "firmly rooted" hearsay exception but rather under a rule of evidence. From there, the majority opinion implies that some of the factors used to admit the statement as a rule of evidence also served to make the statement admissible for Confrontation Clause purposes. This same tactic was used on direct appeal. The tactic was and is highly disingenuous.

The majority opinion conspicuously fails to mention that factors considered on direct appeal that related to "the circumstances surrounding the making of the confession" have been completely discredited by *Lilly* and other cases. These factors are the fact that Wade was not under arrest at the time, that he had been read his *Miranda* rights prior to questioning, that he signed a written waiver thereto, and that there was no suggestion that Wade was attempting to curry favor with the police. The *Lilly* Court summarily rejected similar arguments by the Commonwealth of Virginia. *Lilly*, 527 U.S. at 137–39, 119 S.Ct. at 1900–01, 144 L.Ed.2d at 135–36, citing *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

Therefore, I would hold that, under *Douglas*, *supra*, there was a clear and *175 palpable error made on direct appeal in holding that Wade's confession was properly admitted. Further, this error without a doubt severely prejudiced Taylor at trial. It is a mistake for the majority opinion to use the law of the case doctrine to avoid reaching the result that is required to correct the errors made at trial in this case.

For the reasons set forth above, I would reverse the trial court and remand this case for a new trial.

All Citations

63 S.W.3d 151

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

Page 72

821 S.W.2d 72
Victor Dewayne TAYLOR, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.
No. 86-SC-481-MR.
Supreme Court of Kentucky.
Sept. 6, 1990.
As Modified July 3, 1991.
Dissenting Opinion of
Justice Leibson July 3, 1991.
Certiorari Denied Feb. 24, 1992.
See 112 S.Ct. 1243.

Page 73

Frank W. Heft, Jr., Louisville (Daniel T. Goyette, Jefferson Dist. Public Defender, of counsel), for appellant.

Frederic J. Cowan, Atty. Gen., David A. Smith, Denise A. Garrison, Asst. Attys. Gen., Frankfort, Ernest A. Jasmin, Sp. Asst. Atty. Gen., Asst. Comm. Atty., Louisville, for appellee.

WINTERSHEIMER, Justice.

Victor Dewayne Taylor appeals from a judgment based on a jury verdict which convicted him of two counts of murder, kidnapping and first-degree robbery and one count of first-degree sodomy. He was sentenced to death on the murder and kidnapping convictions and to consecutive twenty year terms of imprisonment for the robbery and sodomy convictions.

Taylor and codefendant George Wade were charged with the murders, kidnapping and robbery of two high school students. The prosecution presented evidence in the form of a statement by Wade which indicated that he and Taylor kidnapped and robbed the two students who had gotten lost on their way to a football game. The young men had stopped at a fast food restaurant to ask directions when they were confronted by Taylor and Wade. Other witnesses indicated that Taylor had a

Page 74

gun and forced the victims to get into their car and drive away. Wade in his statement said that he and Taylor robbed the boys and that he had removed both boys trousers, bound their ankles and gagged them in a Louisville alley. Wade's statement was that Taylor decided to kill the two victims because he was afraid they would identify them. Wade said he waited on a nearby street while Taylor shot both boys in the head.

Upon a change of venue both Taylor and Wade were tried in Lexington. Wade was tried separately and found guilty of two counts of murder, kidnapping, first-degree robbery, but was acquitted of sodomy. The jury recommended sentences of fifteen years on the robbery, twenty-two years on the kidnapping and life imprisonment on the murders. All sentences were to run concurrently, and Wade was sentenced to a total of life imprisonment.

At Taylor's trial Wade, who was tried first, cited his Fifth Amendment right against self-incrimination, and refused to testify. His edited confession was admitted against Taylor.

Taylor, through counsel, raises forty-four assignments of alleged error in this appeal. We have carefully reviewed all of the issues presented by Taylor and this opinion will concentrate on the question of the admissibility of the Wade confession and the propriety of the trial judge's refusal to grant a second change of venue. Allegations of error which we consider to be without merit will not be addressed here.

I

The trial judge did not err by admitting Wade's statement into evidence pursuant to Federal Rule of Evidence 804(b)(3) which was adopted by this Court in *Maynard v. Commonwealth*, Ky.App., 558 S.W.2d 628 (1977); *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978) and reaffirmed in *Dodson v. Commonwealth*, Ky., 753 S.W.2d 548 (1988).

The trial judge in ruling on motions concerning Wade's unavailability as a witness and whether his statement was against his own interest found that FRE 804(e) provides in pertinent part that a witness is unavailable if he is exempted from testifying concerning the subject matter of his statement by a ruling of the trial judge on the grounds of privilege. The trial judge in the presence of Wade, but outside the presence of the jury, determined that Wade would rely on the Fifth Amendment privilege and that the privilege was valid because his conviction was pending on appeal. Accordingly, the trial judge found that Wade was unavailable as a witness pursuant to FRE 804(a)(1) and *Crawley*, supra.

The trial judge after hearing argument of counsel and considering the provisions of the Federal Rule of Evidence 804(b)(3) as well as Kentucky authority concluded that the out-of-court statement of Wade at the time of its making was so far contrary to Wade's penal interests and subjected him to criminal liability that a reasonable man in such a position would not have made the statement unless it was true. He further concluded that the admissions against Taylor in Wade's statement were essentially consistent with his sworn in-court testimony as well as the testimony of three other prosecution witnesses, and in the context of other admissions against Taylor, exclusion would appear to deprive the finder of fact of relevant and reliable evidence.

Trustworthiness of a hearsay statement against penal interest is a prerequisite to its admissibility. *Crawley*, supra, quoting from *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), set out the four factors the Supreme Court deemed relevant to the trustworthiness of such statements: (1) The time of the declaration and the party to whom made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is against the declarant's penal interest and (4) the availability of a declarant as a witness.

Wade's statement was properly admitted into evidence. His statement was made to the police prior to his arrest but after he had been picked up

for questioning. He was Mirandized three times, informed that he failed a polygraph test and

Page 75

identified in a lineup prior to his confession. His final waiver of rights was tape-recorded, reduced to writing and signed in the presence of two police officers. The mere fact that Wade had initially denied any involvement in the crimes and confessed only after receiving notice that he had been identified in the lineup does not render the confession involuntary. Cf. *Commonwealth v. Vanover*, Ky., 689 S.W.2d 11 (1985). There is no suggestion that Wade was attempting to curry favor from the arresting officer. He confessed without promises being made. While he was not under arrest, Wade certainly knew he was a suspect. The statement Wade gave to the police was corroborated in part by five different witnesses. Every material detail of Wade's confession was corroborated by independent testimony and physical evidence.

Wade's statement was against his own interest. His confession was not any less a statement against his own penal interest simply because it also implicated Taylor. Wade admitted that he actively participated in the kidnapping and robbery. He said that he bound, gagged and robbed the victims. He also described the events which culminated in the shootings. The determination of whether an out of court statement is against the declarant's penal interest does not require an assessment of the declarant's subjective motivation. The determination should be made upon an examination of the statement made and application of an objective measure of whether it is against penal interest. By such an assessment, Wade's confession was a statement against his own interest for the purpose of FRE 804(b)(3).

Federal Rule of Evidence 804(a), in relevant part, provides that a declarant is not available for the purposes of the hearsay rule if he:

1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so....

Wade informed the Court that in spite of the prosecutor's proffered immunity he would invoke his fifth amendment privilege against self-incrimination if called to testify. The trial judge correctly determined that Wade who had a pending criminal appeal at the time was unavailable as a witness under FRE 804(a).

Courts are reluctant to admit hearsay evidence because of its inherent unreliability. Numerous exceptions have been carved out of the general prohibition against admitting hearsay. FRE 804(b)(3), statements against penal interest, allows hearsay statements to be admitted if they are against declarant's penal or proprietary interest, trustworthy, and the declarant is unavailable. No lack of trustworthiness could be implied regarding the content of Wade's confession or the circumstances surrounding it. There was no factual basis for the presumptive suspicion that frequently relates to a codefendant's confession. Wade's confession was corroborated in every material detail by independent testimony and physical evidence. Wade was unavailable, his statement was against his own interest, and from the physical evidence, the testimony of witness and Wade's confession, it was reliable and trustworthy. The trial judge was correct in admitting Wade's statement. As a reviewing court, we find no reason to disturb the action taken. *Reichle v. Reichle*, Ky., 719 S.W.2d 442 (1986).

Taylor argues that the introduction of a nontestifying-codefendant's confession invariably results in a violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). He also contends that Rule 804(b)(3) is unconstitutional. The trial judge correctly ruled that the edited confession was admissible in Taylor's separate trial. The confession was the last

item of evidence presented by the prosecution in the case in chief. It was edited to delete all references to other crimes.

Bruton, supra, holds generally that a defendant's Sixth Amendment right

Page 76

to confrontation is violated when he is directly incriminated by the confession of a nontestifying codefendant. The rationale for this general rule of constitutional law is the same as that underlying the general prohibition against hearsay evidence, that is the presumptive unreliability of an extra-judicial confession. *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), a conspiracy case, discussed the relationship between various Federal Rules of Evidence and the Confrontation Clause, and indicates that out of court statements are only presumed unreliable and the presumption may be rebutted by appropriate proof. It also recognizes the cumulative value of certain evidence. When taken together the two principles demonstrate that what may be unreliable in isolation may be probative when corroborated by other evidence. *Bourjaily* also indicated that the literal interpretation of the confrontation clause was too extreme and that the societal interest of accurate fact finding requires harmonization with the confrontation provision. Accommodation of these competing interests has in general required the prosecution to demonstrate both the unavailability of the witness and the indicia of reliability surrounding the out of court statements.

A number of federal circuit courts have followed the *Bourjaily* philosophy. See *United States v. Robinson*, 635 F.2d 363 (5th Cir.1981); *United States v. Katsougrakis*, 715 F.2d 769 (2nd Cir.1983); *United States v. Harrell*, 788 F.2d 1524 (11th Cir.1986); *United States v. Kelley*, 526 F.2d 615 (8th Cir.1975).

A codefendant's confession is not per se untrustworthy but is only presumptively unreliable and the presumption may be rebutted.

Dodson, *supra*, held that this type of evidence can be admissible if its presumptive unreliability is sufficiently rebutted by corroborating circumstances which clearly indicate its trustworthiness.

In view of the trial judge's holding that the statement came in as a recognized exception to the hearsay rule, we find no conflict with the confrontation clause. See *Crawley, supra*; *Bourjaily, supra*.

II

The trial judge did not abuse his discretion when he overruled Taylor's second change of venue motion for lack of reasonable notice. Taylor admitted that his motion was filed late.

The prosecution was not given reasonable notice of the motion for a second change of venue. Accordingly without reasonable notification the Commonwealth could not present evidence in support of its opposition to the motion by subpoenaing witnesses to testify or otherwise prepare to contest the motion. *Sullivan v. Commonwealth*, 185 S.W. 134, 169 Ky. 797 (1916). Therefore the trial judge did not abuse his discretion by denying the motion. Cf. *Geary v. Commonwealth*, Ky., 503 S.W.2d 505 (1972). The argument that the prosecution received constructive notice is without merit.

It is unnecessary to consider the argument by Taylor that Kentucky Revised Statute 452.240 is unconstitutional. The statute provides that not more than one change of venue shall be allowed to any person or to the state in the same criminal action. Taylor had already been granted one change of venue from Louisville to Lexington. The trial judge did indicate when he denied the second change of venue that he would consider moving the trial if he discovered problems in seating an impartial jury.

In regard to the issue of juror bias, a careful examination of the extensive record of jury voir dire indicates that the trial judge took very extended precautions to insure the fairness of the

jury panel. The prospective jurors were subject to general and individual voir dire regarding publicity about Wade's sentence and as to their ability to be impartial. All prospective members of the jury received a letter from the Court Administrator advising them not to read or discuss the Wade trial. They all indicated that they had followed the instructions of the court. The record clearly indicates that all twelve jurors demonstrated that they had little if any knowledge of either Wade or Taylor and only one juror

Page 77

had even heard of the so-called Truth in Sentencing legislation. None of the responses indicated any degree of prejudice as a result of pretrial publicity. The selection of the jury was fair and impartial. Consequently there was no need for a second change of venue. See *Kimbrough v. Commonwealth*, Ky., 550 S.W.2d 525 (1977); also *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981).

Under the trial court's instructions the appellant was sentenced to death four times, once each for murder and kidnapping as to each victim. The appellant argues that Section 13, the double jeopardy provision of the Bill of Rights in the Kentucky Constitution, and the 5th and 14th Amendments of the United States Constitution, prohibit imposing the death penalty for kidnapping and murder of the same victim in present circumstances. The appellant was death eligible for kidnapping under Kentucky law, KRS 509.040(2), only because he was found guilty of murdering the victims.

The defendants in *Cosby v. Commonwealth*, Ky., 776 S.W.2d 367 (1989), like the present appellant, argued that double jeopardy principles forbid the imposition of the death penalty for murder and kidnapping, "when the same act of murder" provides the justification. Kidnapping is only a capital offense under Kentucky law "when the victim is not released alive," which "refers to the victim's death being caused by some aspect of the kidnapping, not to a fortuitous and unrelated

circumstance." Id. at 372. Therefore, as Cosby states, "murder and kidnapping merge at the enhancement stage." Id. at 373.

The death sentence imposed on Taylor was not inappropriate, arbitrary, cruel, unusual or disproportionate. The death penalty statute was constitutionally applied. The mitigating circumstances did not outweigh the aggravating circumstances.

In making review required by K.R.S. 532.075(3), we find nothing in the record that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. The death sentence was not excessive or disproportionate to the penalty imposed in similar sentences since 1970 considering both the crime and the defendant. Those cases have been previously recited by this Court in *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988) and that list is incorporated herein by reference and our review is in accordance with K.R.S. 532.075(5). In addition, we have also considered the case of *Moore v. Commonwealth*, Ky., 771 S.W.2d 34 (1989). We have conducted an independent review of the circumstances and conclude that they exceed any minimum justifying capital punishment.

While the judgment of conviction is affirmed, the Court vacates two of the four death sentences, being the two imposed on the kidnapping convictions, and remand is directed for resentencing on these charges as Class A felonies.

STEPHENS, C.J., and LAMBERT, REYNOLDS and SPAIN, JJ., concur.

LEIBSON, J., dissents by separate opinion, in which COMBS, J., joins.

LEIBSON, Justice, dissenting.

Respectfully, I dissent for two reasons, both directed at the impermissible use of the out-of-court statement of the nontestifying co-defendant, George Wade:

1) As to that portion of Wade's statement inculcating Taylor as the murderer, no impartial observer can accept as fact that Wade intended to make a declaration against penal interest, as necessary to be admissible under FRE 804(b)(3);

2) Admitting this evidence violated the Confrontation Clause in the Sixth Amendment of the United States Constitution and Sec. 11 of the Kentucky Constitution.

Before an out-of-court statement of a witness is admissible as a declaration against interest, FRE 804(b)(3) states first it must be "at the time of its making so far contrary to" the declarant's penal interest "that a reasonable person in [his] position would not have made the statement unless he believ[ed] it to be true." The Majority has addressed this problem as a purely technical matter: Wade's depiction of how

Page 78

Taylor murdered the victims exposed Wade to criminal liability for murder based on complicity (KRS 502.020). True, but the test for whether a statement is an exception to the hearsay rule under FRE 804(b)(3) is much less complicated: how would "a reasonable person in his position" view it at the time he made the statement; was Wade then seeking to inculcate himself in these murders or to exonerate himself? We have held in *Fisher v. Duckworth*, Ky., 738 S.W.2d 810, 815 (1987) that "the burden is on the party seeking to use this exception ... to first establish a basis" by proof the declarant had knowledge at the time he made the statement that it was against his interest. As stated in *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir.1985):

"Hearsay under the declaration against interest exception is unreliable unless the declarant is aware at the time of making the statement that it is against his interest."

-And, as explained in the Federal Rules of Evidence Manual, 4th ed., Saltzburg and Redden, p. 940 (discussing "Declarations against interest"):

"Whenever a statement against interest is offered, it is the job of the Trial Judge to determine whether the declarant was under the impression that the statement was against his interest at the time he made it." [Emphasis added.]

An objective view of Wade's statement compels the conclusion that in the critical portion pertaining to the murders Wade did not intend to inculcate himself but, on the contrary, in general to disassociate himself from responsibility for the murders, and in particular to avoid the death penalty, the more serious consequence likely to flow from being directly involved. It is simply not credible for our Court to qualify statements obviously made to avoid the death penalty as admissible under a hearsay exception for statements against penal interest. To quote the critical portions of Wade's statement:

Wade And after we searched the car and everything you know, we was gettin' ready to go ridin' and then, all of sudden you know....

Duff Well, wait a minute now, You and Vic were getting ready to go riding?

Wade Yeah. And then, Vic said uh, hey, you know they done seen us, like that. I said.... and I said man, that's, you know, that ain't nothin, like that. He said, but you know they done seen us. And uh....

Duff What did he mean by that?

Wade He said, they done seen us, you know.

Duff Right.

Wade They done seen our face.

Duff Okay.

Wade But I told him it wasn't nothin', you know.

Duff What do you think he meant by that?

Wade I couldn't tell you. I don't know. I don't know nothin'. He..man, he's wild man. And uh,....

Duff You mean Vic's wild?

Wade Yeah.

Duff Vic Taylor, is that who you're talking about?

Wade Yeah.

Duff Okay. Go on.

....

Duff Okay. Were they still alive at this point?

Wade Ah, yeah.

Duff Okay.

Wade They were still alive. So uh, like we walkin' away and uh, he said man, you know they done seen us man, people done seen us. I said man, it don't make no difference. Then, he told me to hold up for a minute. 'Cause we walkin' like uh, at the end of where, where they at. Where the car's parked at right there on the side of the building. We walkin' back down toward you know, goin' towards Preston Street.

....

Wade He said, hold up for a minute. And I, you know I hold up. I was waitin' right around uh, right on the end of the building. Right around the

Page 79

corner where I was waitin' for him. He said, hold up. I asked him what he was gonna do. He just told me to hold up for a minute. And then, that's uh ... I heard, I heard that shot. I, I left. I didn't hear nothin' else. I just heard that shot. And I was gone. And....

Duff Did you take off running?

Wade Yeah. 'Cause I, you know, I didn't know what he was gonna do. And I heard another shot when I got to the end of the alley. I heard another shot.

Moody This is uh, Sgt. Moody speaking. George, where were you standing exactly when you heard the first shot? Where were you standing when you heard the first shot fired?

Wade Right around uh, right around the little ... it's a little building right there on the corner of the alley. Right there on the left hand ... yeah, on your left hand side from where they was. A little building. I was standin' right around the corner.

Moody Okay. And where.... you stated that you ran. Which way did you run?

Wade Out towards Preston. I, you know ... nah. No, I didn't. I ran out towards uh, ran out towards uh, what's, what's that? Caldwell. 'Cause it's Caldwell and Caldwell runs into Preston, you dig.

Moody Okay. So, you're running towards Preston and Caldwell Street when, when you heard the first shot? You started running in that direction when you heard the first shot?

Wade Yeah.

Moody Okay. So, and then, as you were running, what happened or what took place then?

Wade I heard another shot, you know. I knew what it was. I told him (inaudible). I said man, don't do that. 'Cause he uh, asked me. I said, don't do that man. Yeah. I said, nah, that ain't you know, it wasn't worth that. Plus they didn't have nothin'.

Moody Okay.

Wade They didn't have nothin' for real, for as you know, for it to be like that.

Moody Okay. So, after you started running and heard the first.... second shot, then continue on. What happened?

Wade We uh, after I heard the second shot, I see Vic come runnin' up behind me. I said, what did you do. I said.... he said man, you know what I done. He said, I, I shot them. Like that. He just

come back laughin', you know and stuff like that. He was laughin' like, you know, he was crazy or somethin'.

In two recent Kentucky cases, *Dodson v. Commonwealth*, Ky., 753 S.W.2d 548 (1988) and *Barnes v. Commonwealth*, Ky., 794 S.W.2d 165 (1990), our Court reversed because of the use of out-of-court statements against the accused in circumstances much less oppressive than the present ones. The fact situation in *Dodson* was almost identical to what we have here, erroneous use of an out-of-court statement from a robbery confederate who "was called as a witness and refused to testify." In *Barnes* the fact situation was erroneous use against the accused of the victim's prior statement controverting the defense of accidental homicide. The statement was an affidavit from a divorce case filed by his wife two and a half years previously stating *Barnes* had "on numerous occasions physically thrown [the victim] out of [her] home, ... hit her and threaten[ed] to shoot [her] with his rifle or handgun." The circumstantial guarantees of trustworthiness for the affidavit in *Barnes* were much greater than in the present case. In *Barnes* we rejected a claim that the evidence qualified "under the present state of mind exception to the hearsay rule," stating the evidence does not "fit[] within a recognized exception" to the hearsay rule. 794 S.W.2d at 167. The claim in the present case that Wade's statement, quoted above, qualifies as a declaration against penal interest likewise does not "fit within a recognized exception" to the hearsay rule. Wade did not make the statement implicating the appellant until he had spent

Page 80

more than ten hours in police custody, and had made numerous denials of any knowledge or participation in the crimes. He confessed only after he had been informed that he had failed a polygraph examination and had been identified by a witness.

It is difficult to understand how the same judges who authored and concurred in Majority

Opinions in *Dodson* and *Barnes* can reconcile having done so with joining the present Majority Opinion which is authored by and follows closely the views expressed in the Dissents in those cases. The views taken here are in sharp conflict with the *Dodson* and *Barnes* opinions. We have expanded the "declaration against interest" exception to the hearsay rule all out of reason.

Next, this result is in conflict with the Confrontation Clauses found in both the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution, which are, at the same time, both separate from, yet integral to, the hearsay exceptions. The landmark case holding the use of an out-of-court statement from a confederate is a violation of the Confrontation Clause is *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). *Douglas v. Alabama* was reversed because, as in the present case, the written statement purporting to be the confession of an accomplice was read to the jury after the accomplice who was called as a witness invoked his privilege against self-incrimination and refused to testify. Twenty years later *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), reaches the same conclusion. In *Lee v. Illinois* the trial court relied upon a co-defendant's confession as substantive evidence against *Lee* in violation of the accused's rights under the Confrontation Clause of the Sixth Amendment. In *Douglas v. Alabama*, the circumstances were substantially identical to the present case and in *Lee v. Illinois*, the circumstances were no different except that both defendants were tried in the same trial. This is a distinction without a difference insofar as the use of one defendant's statement against the other.

There is an exception made in a joint trial which has its genesis in language of the opinion in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), applied more recently in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) and *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), reh. denied 483 U.S. 1044, 108 S.Ct. 19, 97 L.Ed.2d 807 (1987). This exception permits the statement of a

defendant to be used in a joint trial, but only against himself and not against his co-defendant. Any mention of the nonconfessing co-defendant must be carefully redacted to eliminate prejudice to the nonconfessing co-defendant from the unauthorized use of hearsay. The fact that the statement of a co-defendant, so carefully redacted that no prejudice inures to the nonconfessing co-defendant, is admissible in a joint trial adds nothing from which to infer that a nonredacted, accusatory out-of-court statement of a co-defendant is admissible as substantive evidence of guilt. Indeed, the opposite should be inferred from the *Bruton* rule.

It is apparent from the language in the Opinion that the Majority of our Court has misunderstood *Lee v. Illinois*, supra, as permitting use of a hearsay statement as "probative when corroborated with other evidence." Majority Opinion p. 76. The Majority opines the court can make an exception for out-of-court statements it believes "trustworthy" because corroborated by other evidence in the case, in this case statements Taylor purportedly made about the killings to other witnesses. We are not free by expanding exceptions to the hearsay rule to create exceptions to the Confrontation Clause. The teaching of *Lee v. Illinois* is to the contrary, that interpretation of hearsay exceptions can inform the reach of the Confrontation Clause, but cannot control it.

Before we assume that our Court can avoid the Confrontation Clause by expanding the definition of what qualifies as a declaration against penal interest, we should take heed of this footnote in *Lee v. Illinois*:

Page 81

"We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for a meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 476 U.S. at 544, 106 S.Ct. at 2064, 90 L.Ed.2d at 528.

If some in the Majority doubt the limitations generated by the Confrontation Clause on our ability to expand hearsay exceptions against the criminally accused, such doubt should be dispelled by the most recent United States Supreme Court pronouncement on this subject in *Idaho v. Wright*, 497 U.S. ----, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), brought to our attention in the Petition for Rehearing. In *Idaho v. Wright* the United States Supreme Court reversed a conviction based on a hearsay statement qualifying under Idaho's "residual hearsay exception."¹ Just as we do in this case, in *Wright* the Idaho Supreme Court cited and then misapplied a caveat from *Lee v. Illinois* stating that, although hearsay, a statement may withstand Confrontation Clause challenge "if it is supported by a 'showing of particularized guarantees of trustworthiness'" [476 U.S. at 543, 106 S.Ct. at 2063, 90 L.Ed.2d at 528]. In *Idaho v. Wright*, the U.S. Supreme Court states:

"We agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at ----, 110 S.Ct. at 3148, 111 L.Ed.2d at 655. [Emphasis added.]

Thus, while the Confrontation Clause does not foreclose use of traditional, firmly rooted and well-defined hearsay exceptions, it forecloses using new and expanded definitions of admissible evidence to impair Sixth Amendment rights.

While it would be proper to take into consideration the circumstances at the time Wade made his statement in deciding whether it was a declaration against penal interest, unfortunately these circumstances bear none of the indicia of reliability and trustworthiness required for making hearsay exceptions. He was then seeking to mitigate his criminal liability, not to expand it. Our Court finds some circumstantial guarantee of trustworthiness only by considering corroborating evidence from other persons, admissions made by Taylor on other occasions, matters entirely

separate from the making of Wade's statement. This is not the theme of the so-called "particularized guarantees of trustworthiness" articulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) and then quoted as stated above in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

It should be abundantly clear that hearsay is permissible as an exception to the Confrontation Clause only in limited circumstances where it comports to a traditional, well-recognized and clearly defined hearsay exception. Unwisely, our Court in this Opinion has greatly expanded what qualifies as a declaration against interest. A state court may be free to expound and expand its own hearsay doctrine, even when it is unwise, but it is not free by doing so to restrict the reach of the Confrontation Clause. We have no power to impair the rights of the criminally accused guaranteed by the Confrontation Clause in the Sixth Amendment. Indeed, we lack authority to override the constitutional limits of Section Eleven of our own Constitution by finding the evidence "trustworthy" because there is other evidence of guilt. No light flashes on inside our head to tell us this statement is trustworthy; no bell rings to tell us it is not. If we judges decide to admit such statements on an ad hoc basis whenever we deem them sufficiently trustworthy because of other evidence, the system will soon fall apart.

Page 82

The constitutional rule is the circumstances surrounding the taking of Wade's statement are the only evidence to be considered in determining its admissibility; these "particularized circumstances," standing alone, provide no indicia of reliability to render his accusations of Taylor admissible. The holding in *Wright* is "the use of corroborating evidence to support a hearsay statement's particularized guarantees of trustworthiness" is constitutionally impermissible. Yet that is exactly what our Court does in the Majority Opinion. *Wright* states:

"Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." 497 U.S. at ----, 110 S.Ct. at 3150, 111 L.Ed.2d at 656. [Emphasis added.]

The Majority Opinion mistakenly relies upon *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), as authority for a "philosophy" accommodating a balancing test between "societal interests" and the reach of the Confrontation Clause. This is a clouded view of the constitutional guarantee and a complete misunderstanding of the *Bourjaily* opinion. *Bourjaily* involved the crime of conspiracy and the traditional, well-established and deeply rooted hearsay exception codified in FRE 801(d)(2)(E) for a statement by a co-conspirator. Such a statement is not hearsay if made "during the course and in furtherance of the conspiracy." Statements taken from *Bourjaily* have been misapplied in our Majority Opinion. *Bourjaily* conforms to the limitations in *Douglas v. Alabama* and its progeny, including *Lee v. Illinois* and *Idaho v. Wright*. *Bourjaily* does not afford us a different view to choose from; it has no application to the facts at hand.

Although Wade's out-of-court statement was certainly not the only evidence to prove Taylor guilty of these killings, the Commonwealth has conceded it was a powerful conclusion to its case. If believed, it provided important incriminating details not brought out in any other evidence. Being objective, there is no way to qualify the error in this case as harmless using the "harmless beyond a reasonable doubt" requirement for constitutional error mandated by *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

I share the public's horror and outrage at these monstrous crimes. But we are not jurors free to decide based on what we think Taylor deserves. This brings to mind the warning of Justice Louis D. Brandeis in *Olmstead v. United*

States, 277 U.S. 438, 479, 48 S.Ct. 564, 573, 72 L.Ed. 944, 957 (1928):

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

We are judges charged with the duty to reverse and remand when confronted with prejudicial error. Recognizing my responsibility under the law, I dissent.

COMBS, J., joins this Dissent.

1 Unlike Idaho, in Kentucky we do not accept the "residual hearsay exception" (See *Wager v. Commonwealth*, Ky., 751 S.W.2d 28 (1988)), so the evidence could not limp in on this crutch even if in *Idaho v. Wright* the U.S. Supreme Court had reached a different result.