No. _____

In The
Supreme Court of the United States

RAYNELLA DOSSETT LEATH,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When state law commits full fact-finding responsibility to the jury mandating that the jury deliberate sequentially using an acquittal-first, hard-transition approach and that judges make specific inquiries before declaring a mistrial, does a judge's ruling circumventing those requirements violate the accused's right to trial by jury and impede the guarantee against double jeopardy?

Does an instruction that requires the jury to determine first, "if" they believe defendant's alibi evidence before they can consider the evidence shift the burden of proof to the defense in violation of the Due Process Clause?

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Tennessee Court of Criminal Appeals

State v. Raynella Dossett Leath, 2013 WL 2420639, No. E2011-00437-CCA-R3-CD (Tenn. Crim. App. June 3, 2013), *perm. app. denied*, (Tenn. Nov. 13, 2013)

STATEMENT OF THE BASIS FOR SUPREME COURT JURISDICTION

On November 13, 2013, the Tennessee Supreme Court denied Petitioner permission to appeal a decision of the Tennessee Court of Criminal Appeals. The appellate court decision affirmed a jury verdict finding Petitioner guilty of murder in the first degree under Tennessee Code Annotated Section 39-13-202. No rehearing was sought. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) and for the reasons set forth in Rules 10(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. Const. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

Tennessee Rules of Criminal Procedure 31(d)(2) is reproduced at App. 87.

STATEMENT OF THE CASE

Petitioner Raynella Leath was charged in November 2006 with the premeditated, first-degree murder of her husband in connection with his March 2003 death. During Petitioner's first trial, in March 2009, when the jury announced after a few hours of deliberation that it was unable to reach a verdict, the trial judge instructed the jury in clear violation of state law, prompting counsel's objection and motion for mistrial. The judge denied counsel's motion and the jury continued to deliberate. The following day after several additional hours of deliberation, the judge *sua sponte* declared a mistrial and discharged the jury without counsel's consent and in complete contravention of Tennessee's required sequential verdict system. App. 112.

Following the judge's declaration of mistrial, Petitioner sought a dismissal based on double jeopardy grounds. The trial court denied the motion and Petitioner was retried in January 2010. As was true during Petitioner's first trial, the State's theory of the case was that Petitioner had staged an alibi in order to claim innocence in her husband's death. Because Petitioner presented numerous witnesses who confirmed that she was not at the scene of her husband's

death, Petitioner requested a jury instruction that informed the jury that the state had the burden of proving beyond a reasonable doubt that she was present at the time and place of the alleged crime. App. 138. The judge instead used an alternate instruction that isolated Petitioner's alibi evidence for greater scrutiny and shifted the burden of proof to the defense. App. 140. The jury ultimately returned a verdict finding Petitioner guilty of first-degree murder. The Tennessee Court of Criminal Appeals affirmed and the Tennessee Supreme Court denied discretionary review.

REASONS FOR GRANTING THE WRIT

Petitioner's case concerns the core guarantees of our criminal justice system – the right to trial by jury, the protection against double jeopardy, and the presumption of innocence. In Petitioner's case both the declaration of a mistrial, in violation of state requirements and without considering available less drastic alternatives, and the use of a burden-shifting alibi instruction impeded Petitioner's fundamental right to trial by jury.

In *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012) and *Renico v. Lett*, 559 U.S. 766 (2010), this Court resolved double jeopardy issues against the backdrop of various verdict and deadlock resolution systems. In neither case was the Court asked to consider the tension between the protection against double jeopardy and the right to trial by jury that arises when a

jurisdiction's chosen verdict system produces jeopardy determinations which have jeopardy consequences.

In addition to addressing that tension, this Court should grant certiorari to resolve the important conflict that exists in the courts fostered by an expansive reading of *Blueford* and *Renico* and as a result of significant variations in the application of the manifest-necessity standard. By granting certiorari, this Court can buttress the manifest-necessity standard and can assure that further extension of the holdings in *Blueford* and *Renico* do not lead to an indiscriminate violation of the right to trial by jury.

Moreover, this Court should grant certiorari to address the Tennessee courts' continued adherence to an outdated and disfavored alibi instruction that disparages alibi evidence, shifts the burden of proof, and undermines the presumption of innocence in violation of due process of law.

ARGUMENT

Introduction

Tennessee, like many jurisdictions, has adopted[1] a sequential verdict system that requires a jury to

[1] Rule 31 of the Tennessee Rules of Criminal Procedure, which sets out Tennessee's sequential verdict and impasse resolution system, was adopted by the Tennessee legislature. Tenn. Code Ann. § 16-3-404 (2009) (providing for adoption of procedural rules by general assembly).

address offenses in sequence and to reach a unanimous result on a greater offense before considering a lesser one.[2] In these acquittal-first, hard-transition (hereafter AF-HT) jurisdictions, a jury that convicts a defendant for the charged offense does not consider the lesser-included offenses.[3] But once the jury reaches a unanimous verdict of not guilty on the charged offense, the jury is required to consider the lesser-included offenses in sequence. In an AF-HT

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[2] States use four approaches to guide juries in their deliberations (referred to as "systems" throughout this Petition): acquittal-first, hard-transition; modified acquittal-first, or soft transition; reasonable efforts; and defendant's option. *See generally* Jay M. Zitter, Annotation, *When Should Jury's Deliberation Proceed from Charged Offense to Lesser-Included Offense*, 26 A.L.R. 5th 603 (1995); *see also State v. LeBlanc*, 924 P.2d 441, 444-45 (Ariz. 1996) (Martone, J., concurring) (summarizing approaches, listing states that use each, and noting that majority of states use acquittal-first, hard-transition approach).

[3] *See e.g., Lindsey v. State*, 456 So.2d 383, 387 (Ala. Crim. App. 1983), *aff'd sub nom. Ex parte Lindsey,* 456 So.2d 393 (Ala. 1984), *cert. denied*, 470 U.S. 1023 (1985); *State v. Sawyer*, 630 A.2d 1064, 1071 (Conn. 1993); *State v. Townsend*, 865 P.2d 972, 979 (Idaho 1993); *Walker v. State,* 671 So.2d 581, 607-08 (Miss. 1995); *State v. Van Dyken*, 791 P.2d 1350, 1361 (Mont.), *cert. denied*, 498 U.S. 920 (1990); *State v. Goodwin*, 774 N.W.2d 733, 747-88 (Neb. 2009); *State v. Taylor*, 677 A.2d 1093, 1096 (N.H. 1996); *State v. Harris*, 662 A.2d 333, 347 (N.J. 1995); *People v. Boettcher,* 505 N.E.2d 504, 507-08 (N.Y. 1987); *State v. Huber*, 555 N.W.2d 791, 797 n.2 (N.D. 1996); *State v. Wilson,* 173 P.3d 150, 152 (Or. App. 2007); *State v. Davis*, 266 S.W.3d 896 (Tenn. 2008).

jurisdiction, a jury that convicts a defendant of a lesser-included offense has unanimously found defendant not guilty of all greater offenses. The selection of an AF-HT sequential verdict system reflects a policy decision, implemented by courts or legislatures, that an AF-HT sequential verdict system balances the governmental interest in finality as well as defendant's interest in fairness. *See e.g., State v. Davis*, 266 S.W.3d 896, 907 (Tenn. 2008) (noting that "serious policy considerations favor the continued use of acquittal-first jury instructions").

In addition to a sequential verdict system, some AF-HT jurisdictions, including Tennessee, have adopted[4] a specific procedure that judges must follow in the event of jury impasse. Tennessee's procedure, found in Tennessee Rule of Criminal Procedure 31(d)(2), is typical. App. 87. It provides that "if the jury reports that it cannot unanimously agree on a verdict, the court *shall* . . . inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. . . ." *Id.* (emphasis added). The Rule specifies the judge's exact inquiry. *Id*. In AF-HT jurisdictions like Tennessee, the judge must determine whether the jury has unanimously reached a verdict on any offense and if so must accept that partial verdict. *See e.g., Whiteaker v. State*, 808 P.2d 270, 274 (Alaska Ct. App. 1991); *State v. Tate*,

[4] The Tennessee procedure, set out in Rule 31, App. 87, is a "law[ ] of the state." *See Tennessee Dep't of Human Servvices v. Vaughn*, 595 S.W.2d 62, 63 (Tenn. 1980) (holding that rules of civil procedure are "laws").

773 A.2d 308, 323 (Conn. 2001); *State v. Castrillo*, 566 P.2d 1146, 1149 (N.M. 1977), *overruled in part on other grounds in State v. Wardlow*, 624 P.2d 527 (N.M. 1981); *State v. Houston*, 328 S.W.3d 867, 877 (Tenn. Crim. App. 2010).

In these jurisdictions, when a jury announces that it is deadlocked, the judge is required to determine the nature of the deadlock. A jury's announcement of deadlock does not necessarily mean that the jury is completely unable to reach a verdict. It may indicate a permanent impasse if, for example, the jury is deadlocked on the charged offense, but it may also indicate an acquittal of the charged offense if the jury is deadlocked on a lesser-included offense. Because a deadlock in an AF-HT jurisdiction is meaningless absent clarification, judges in AF-HT jurisdictions may not discharge a jury that announces it is deadlocked as a matter of course. *See e.g.,* Md. R. Crim. P. 4-327; N.M. R. Crim. P. 44(d); N.Y. Crim. Proc. Law § 310.70(1)(b)(i); Tenn. R. Crim. P. 31(d)(2). Rather, in order to determine whether the jury has reached any verdict, the judge must follow the mandatory procedure in order to determine the nature of the deadlock.

I. Adoption of an acquittal-first, hard-transition verdict system signifies a jurisdiction's commitment to and confidence in trial by jury.

A jurisdiction's decision to adopt an AF-HT sequential verdict system, such as Tennessee's, represents a

staunch commitment to the right to trial by jury, reflecting a "profound judgment about the way in which the law should be enforced and justice administered. . . ." *See Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Like the protection against double jeopardy, the right to trial by jury provides the accused an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156; *United States v. Martin-Linen Supply Co.*, 430 U.S. 564, 572 (1977).

Tennessee's adoption of an AF-HT verdict system demonstrates that it has placed confidence in the jury as fact-finder and given the jury the responsibility of determining "the truth of every accusation." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) (quoted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). The exclusive province of the jury to determine the facts is guarded jealously from judicial interference, *see e.g., Brasfield v. United States,* 272 U.S. 448 (1926) (holding that judge's attempt to determine division of jury during deliberations was error), to such an extent that even a jury's erroneous factual determination must be given effect. *See United States v. Ball*, 163 U.S. 662, 671 (1896). In the last decade, this Court has reinvigorated the right to trial by jury, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and reestablished trial by jury as "one of the forms of sovereignty of the people." Alexis de Tocqueville, DEMOCRACY IN AMERICA (1835-1840).

Tennessee's AF-HT verdict system embraces and respects the jury's exclusive province as fact-finder by giving full effect to all of the jury's factual findings. Thus, for example, when a jury finds a defendant guilty of second-degree murder, concluding that the state has failed to prove premeditation as required for a conviction of first-degree murder, it could not be argued that a second jury could retry the case to look again for sufficient proof of premeditation. *See Ireland's Case*, 7 How. St. Tr. 79 (1678). The jury's factual determination has foreclosed that possibility. The situation is no different when that same jury announces, in the first-degree murder case, that it is deadlocked on the charge of second-degree murder. In an AF-HT jurisdiction, like Tennessee, that announcement means that the jury has unanimously acquitted defendant of first-degree murder. A second jury may not be impaneled to give the prosecution a second chance. In both scenarios the jury's factual determination must be given effect because the jury has the final say.

Petitioner was tried twice for first-degree murder in Tennessee, a jurisdiction that, since its founding, has recognized the "inestimable value" of the right to trial by jury and has protected it against all encumbrances. *Neely v. State*, 63 Tenn. 174, 184 (1874) (noting that the right is "solemnly ordained in all three of Tennessee's Constitutions"); Tenn. Const. Art. I, § 6 (guaranteeing that the right to trial by jury "shall remain inviolate"). Despite a state law that committed full fact-finding prerogative to the jury and

required that all jury findings be given effect, the trial judge in this case circumvented that law and in so doing violated Petitioner's right to trial by jury and guarantee against double jeopardy.

When Petitioner's first jury ultimately announced that "the jury remains hung with no *further* possibility of compromise," App. 111 (emphasis added), the judge was required to determine exactly what compromises the jury had made and the nature of the deadlock. App. 87. The jury's announcement could have meant a number of things. The jury might have been deadlocked on the charged offense but, given the length of their deliberations, and the foreperson's use of the word "further," the announcement just as likely indicated that the jury was deadlocked on any one of several lesser-included offenses.

When the judge in Petitioner's case failed to inquire as to the nature of the jury's deadlock, as required by state law, the judge violated Petitioner's right to trial by jury. By failing to inquire, it became impossible for the court to give effect to any of the jury's factual findings. By declining to follow state law, the judge effectively nullified any verdict the jury had reached and concealed from Petitioner the very information that she would need to establish a double jeopardy bar.[5] Because double jeopardy principles

[5] Defendants have no other means of acquiring this information either during or after trial. Tenn. R. Prof. Conduct 3.5(b) (prohibiting ex parte communication with jurors); Tenn. R. Prof. Conduct 3.6(c) (limiting communication with jurors after

(Continued on following page)

prohibit a retrial on any charge that the jury has resolved in defendant's favor, defendant has the right to know when a resolution has occurred. *See United States v. Martin-Linen Supply Co.*, 430 U.S. at 572 (holding that judge must be "barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.").

II. Adoption of an AF-HT verdict system with a mandatory procedure for addressing jury deadlock reflects a jurisdiction's commitment to robust enforcement of the Double Jeopardy Clause.

The Tennessee legislature's adoption of an AF-HT verdict system not only signifies the state's commitment to trial by jury, but also evidences its intent that the state administer an efficient justice system that gives effect to every partial verdict. Following Rule 31(d)(2) enables the state to allocate scarce resources to retry defendants only for offenses that were not resolved before the jury's deadlock. The adoption of a mandatory procedure for addressing jury deadlock based on a judgment about the administration of a state's criminal judgment system is an appropriate exercise of legislative power, which courts are not free

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discharge of jury). Even if jurors initiate communications with counsel after their discharge, much of the information is inadmissible. *See* Tenn. R. Evid. 606(b) (prohibiting juror testimony on various topics).

to disregard. Moreover, the adoption of Rule 31(d)(2) evidences the state's intent to give full force to the protections of the Double Jeopardy Clause. By requiring that judges determine the nature of jury deadlock and give effect to all verdicts reached, the Rule not only embraces the Constitution's limitations on multiple trials but also demonstrates a strong state intolerance for retrial except in those extraordinary cases where the prosecution has met its high burden of establishing manifest necessity.

III. Double jeopardy protections have unique dimensions in an AF-HT jurisdiction.

Standing as an additional safeguard against abusive government power, the Double Jeopardy Clause protects individuals from overreaching that occurs when the government "with all its resources and power" makes "repeated attempts to convict an individual. . . ." *Green v. United States*, 355 U.S. 184, 187 (1957). This essential protection forbids the government from "subjecting [an individual] to embarrassment, expense and ordeal and compelling [her] to live in a continuing state of anxiety and insecurity" and safeguards against "the possibility that even though innocent [she] may be found guilty." *Id.* at 187-88. Thus, the guarantee against double jeopardy prohibits a retrial whenever a judge or jury has resolved, correctly or not, "some or all of the factual elements of the offense charged," *United States v. Martin-Linen Supply Co.*, 430 U.S. at 572, and when a judge abuses discretion in granting a mistrial

absent a strong showing of manifest necessity. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *see also Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Jorn*, 400 U.S. 470 (1971) (plurality).[6]

The guarantee against double jeopardy must be evenly applied in all of the Nation's courts, regardless of the particularities of the jurisdiction's verdict systems. *Benton v. Maryland*, 395 U.S. 784 (1968). Although the Constitution does not mandate that jurisdictions employ any particular variety of verdict system, the Constitution does require that all jurisdictions prevent double jeopardy violations. Similarly, while the Constitution does not dictate what procedures courts must follow to address jury impasse, *Blueford v. Arkansas*, 132 S.Ct. 2044, 2049 (2012) (noting that in Arkansas, a jury is not allowed to "acquit on some offenses but not on others"), no jurisdiction may use a method that fails to give jeopardy effect to jeopardy determinations. All jurisdictions regardless of their verdict system or jury deadlock procedure must attach jeopardy consequences to jeopardy determinations. A jeopardy determination occurs when a judge or jury resolves factual elements of an offense in defendant's favor as well as when a judge grants a mistrial without an unequivocal showing of manifest necessity. In determining whether a jeopardy

[6] As Justice Stevens noted in his dissent in *Renico v. Lett*, 559 U.S. 766 (2010), *Jorn* though "technically a plurality opinion [was] in all relevant respects . . . a majority product." *Id*. at 784 n.11 (Stevens, J., dissenting).

determination has occurred, all doubts "must be resolved in favor of the liberty of the citizen." *Downum v. United States*, 372 U.S. 734, 746 (1963).

A. Jeopardy consequences must attach to circumstances that are the equivalent of an acquittal.

Consistent with this Court's precedent that "form is not to be exalted over substance" in determining double jeopardy consequences, *Sanabria v. United States*, 437 U.S. 54, 86 (1978); *United States v. Sisson*, 399 U.S. 267, 270 (1970); *United States v. Goldman*, 277 U.S. 229, 236 (1928), jurisdictions that allow partial verdicts must ascribe jeopardy consequences[7] to implicit acquittals and to circumstances that are equivalent to formal verdicts.[8] In an AF-HT partial verdict jurisdiction, a retrial is barred when the jury convicts on a lesser-included offense and when the jury deadlocks on a lesser-included offense.

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[7] Jeopardy consequences, which include barring a retrial, may also include limiting a retrial to a particular offense or to the lowest possible offense. *See Whiteaker v. State*, 808 P.2d 270, 278-79 (Alaska Ct. App. 1991) (presuming jury hung on least serious charge when judge erred in granting mistrial); *see also State v. Tate*, 773 A.2d 308, 325-26 (Conn. 2001).

[8] In addition to implicit acquittals, judicial action, "whatever its label, [that] actually represents a resolution [in defendant's favor], correct or not, of some or all of the factual elements of the offense charged" must be treated as equivalent to an acquittal with corresponding jeopardy consequences. *United States v. Martin-Linen Supply Co.*, 430 U.S. at 571.

This distinguishes an AF-HT partial verdict jurisdiction from a "soft-transition" jurisdiction that does not allow partial verdicts.[9] *See Blueford v. Arkansas*, 132 S.Ct. at 2050. Despite some argument and briefing to the contrary,[10] the Arkansas verdict system at issue in *Blueford* was not an AF-HT system. Blueford's Arkansas jury was not allowed to return a partial verdict, *id.,* but they were allowed to "reconsider a greater offense, even after considering a lesser one." *Id.* at 2051 n.1. This enabled the jury to reconsider its vote on capital and first-degree murder despite its tentative decision that defendant was not guilty of those charges. *Id.* at 2051-52.

In a jurisdiction like Arkansas, the jury's tentative decisions represent *votes* not *verdicts*. *Id*. By contrast, in an AF-HT state like Tennessee, jurors must

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[9] This characteristic distinguishes AF-HT systems like Tennessee's from the soft-transition system at issue in *Blueford*. Unlike the Arkansas system, Tennessee's AF-HT system requires the jury to reach a unanimous verdict on a greater offense before the jury can consider a lesser-included offense. Tennessee verdict forms require that the jury enter a verdict of not guilty on a greater offense before considering a lesser-included offense. T.P.I. Crim. 41.01; *State v. Davis*, 266 S.W.3d 896 (Tenn. 2008).

[10] Blueford's Petition for Certiorari and Brief both asserted that Arkansas was an acquittal-first jurisdiction but the state argued, and this Court's opinion confirmed, that Arkansas is not an AF-HT jurisdiction. *Blueford*, 132 S.Ct. at 2051 & n.1 (noting absence of word "unanimous" from Arkansas jury instruction). Thus, in Arkansas, a deadlocked jury is necessarily deadlocked on all counts, while in Tennessee and other AF-HT jurisdictions, the nature of the deadlock is unknown until the judge conducts the mandated sequential inquiry.

reach a unanimous decision on a greater offense before considering any lesser-included offenses. As a result, any unanimous decision on a greater offense in an AF-HT jurisdiction is not a *vote* but a *verdict* of not guilty. Once a verdict of not guilty is reached, that verdict has jeopardy consequences.

Because of the significant differences between jurisdictions like Arkansas and AF-HT jurisdictions, this Court's narrow holding in *Blueford* has generated confusion.[11] An application of the *Blueford* rationale in AF-HT jurisdictions wrongfully treats verdicts as votes and unacceptably undermines double jeopardy protections in those jurisdictions. Clarifying the parameters of *Blueford* is critically important because of the threat its misapplication poses to vital constitutional rights.

B. Jeopardy consequences must attach when a mistrial is granted in violation of state law and despite less drastic alternatives.

Despite the significance of double jeopardy protection, the Double Jeopardy Clause allows a retrial

[11] Several courts have distinguished the decision in *Blueford*, while others have declined to follow on state law grounds. *See e.g., People v. Aranda*, 162 Cal.Rptr.3d 169 (Cal. App.), *review granted*, 314 P.3d 487 (Cal. 2013); *Blake v. State*, 65 A.3d 557 (Del. Supr. 2013); *McWhorter v. State*, 970 N.E.2d 770 (Ind. App. 2012); *People v. Gause*, 971 N.E.2d 341 (N.Y. 2012); *State v. Fennell*, 66 A.3d 630 (Md. 2013).

in extraordinary circumstances in which a mistrial is required by "manifest necessity." *United States v. Perez*, 22 U.S. at 580 (holding that defendant may be retried following a mistrial if "manifest necessity for the act, or the ends of public justice would otherwise be defeated"). Given the phrase "manifest necessity" its linguistic import, this Court has required a "high degree" of necessity before a mistrial is appropriate, *Arizona v. Washington*, 434 U.S. 497, 506 (1978), and has shouldered the prosecution with the heavy burden of demonstrating that a manifest necessity exists. *Id*. at 505-06 (asserting that the "words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden"); *Downum v. United States*, 372 U.S. at 737 (characterizing the burden as requiring a showing of "imperious necessity").

The accused's "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *see also Arizona v. Washington*, 434 U.S. at 503 (noting the "importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate"); requires that a mistrial only be granted under "urgent circumstances . . . for very plain and obvious causes," *United States v. Perez*, 22 U.S. at 580, and after the judge has considered all other less drastic alternatives.

A trial court considering the "extraordinary" remedy of a mistrial must evaluate all reasonable, less drastic alternatives before granting a mistrial on the

grounds of manifest necessity. *See United States v. Jorn*, 400 U.S. at 486 (plurality).[12] This Court's decision in *Renico v. Lett*, 559 U.S. 766, a habeas action, is not to the contrary. While the Court observed that no particular deadlock resolution system was required, the Court did not retreat from *Perez*'s admonition that mistrials only be granted "under urgent circumstances, and for very plain and obvious causes." *Id*. at 774 (quoting *United States v. Perez*, 22 U.S. at 580). When less drastic alternatives exist, the grant of a mistrial is not a "necessity." *Id.*; *see also Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809 (Cal. 1982); *State v. Tate*, 773 A.2d 308 (Conn. 2001); *State v. Fennell*, 66 A.3d 630 (Md. 2013); *Robles v. Bamberger*, 640 N.Y.S.2d 882 (1996).

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[12] The following courts require consideration of less drastic alternatives before a finding of manifest necessity will be upheld: *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) (holding that "critical inquiry is whether less drastic alternatives were available"); *United States v. Gordy*, 526 F.2d 631, 636-37 (5th Cir. 1976) (recommending that court consider questioning jurors before declaring mistrial); *Long v. Humphrey,* 184 F.3d 758, 761 (8th Cir. 1999) (holding that because of other available alternatives, grant of mistrial was in error); *United States v. Sanders*, 591 F.2d 1293, 1298 (9th Cir. 1979) (reversing grant of mistrial when "nothing in the record indicates that the judge considered alternatives to a mistrial"); *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978) (holding that mistrial was not justified when trial court failed to inquire about ability to reach a verdict).

No manifest necessity requiring the grant of a mistrial existed in Petitioner's case. On the second day of deliberations, following several colloquies[13] between the court and the jury,[14] the jury announced that it was "hung with no further possibility of compromise." App. 111. The mandatory procedure in Tennessee required the judge to "inquire whether there [was] disagreement as to the charged offense and each lesser offense. . . ." App. 87. Rather than inquire as required, the judge immediately discharged the jury and undertook to reset Petitioner's case for a second trial. App. 112. By failing to conduct the required inquiry, the judge failed to consider less drastic alternatives that were mandated by state law.

By adopting Rule 31(d)(2) (which, as noted, is typical of jury deadlock procedures used in AF-HT jurisdictions), Tennessee has demonstrated its intent to attach jeopardy consequences to all appropriate jury determinations. The procedure required by the Rule is a less drastic alternative that must be followed before a trial judge can find manifest necessity. *State v. Tate*, 773 A.2d 308 (Conn. 2001) (recognizing that a manifest necessity cannot be found when judge fails to conduct inquiry); *see* note 12 *supra*.

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[13] These interactions between the judge and jury are discussed in Section II D *infra*.

[14] On the evening before the jury ultimately announced that it was deadlocked, the foreperson assured the judge that "we intend to come in with a fair unanimous verdict." App. 110.

C. The trial judge's grant of mistrial in violation of state law was an abuse of discretion that was not entitled to deference from the appellate court.

The judge in Petitioner's case did not follow the law. A judge's decision to grant a mistrial cannot be "condoned" when the judge acts "irrationally or irresponsibly." *Arizona v. Washington*, 434 U.S. at 514; *Illinois v. Somerville*, 410 U.S. 458, 469 (1973). By clearly not following the law, the judge, by definition, abused his discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). When a trial judge fails to exercise "the sound discretion" entrusted to him, his decision is not entitled to deference. *Arizona v. Washington*, 434 U.S. at 526.

Despite the judge's clear abuse of discretion, the Tennessee appellate court gave deference to the trial judge's decision to grant the mistrial. App. 35. The four paragraphs addressing this issue quoted the manifest-necessity standard; conceded that a mistrial should be declared only "when there is no feasible and just alternative to halting the proceedings"; discussed the available less drastic alternative required by state law; but held that the trial judge's failure to follow the mandatory state law "did not bar the [d]efendant's retrial."[15] App. 36 (quoting *State v. Mounce*, 859 S.W.2d 319, 321 (Tenn. 1993)).

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[15] In finding that the judge's error did not bar the retrial, the intermediate appellate court relied upon defendant's objection to

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The appellate court's decision follows the thin, insubstantial approach to the manifest-necessity doctrine, which has permeated lower court decisions. *See* George C. Thomas III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 239 (1998) (stating that courts applying the manifest-necessity doctrine are engaging in a "ritualistic incantation" of a "thoroughly deceptive misnomer"). Despite the high hurdle appropriately anticipated by the manifest-necessity[16] standard, many lower courts scale the hurdle with complete ease, reciting the standard, but not meaningfully analyzing whether manifest necessity exists in the record. This unfortunate approach has resulted in nearly uniform approval of mistrial grants, greatly weakening the Constitution's prohibition against double jeopardy.

In addition to providing this Court with an opportunity to address the parameters of *Blueford v. Arkansas*, this case also provides a suitable vehicle for this Court to create a uniform approach for the purpose of stabilizing its manifest-necessity jurisprudence. The decisions of the lower courts are at odds on whether the trial court must consider less drastic alternatives as well as on the amount of proof and

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the judge's jury instruction, which is discussed in Section IV D *infra*.

[16] The use of the phrase "manifest necessity" suggests that there must be an obvious, clear (manifest) logically unavoidable (necessity) reason for mistrial.

measure of scrutiny required.[17] Similarly, while some appellate courts painstakingly analyze the circumstances surrounding the grant of mistrial, provide a list of factors to consider, and survey and evaluate other reasonable alternatives, *see United States v. Mark*, 284 F. App'x 970, 973 (8th Cir. 2008); *State v. Tate*, 773 A.2d at 313-17 & 323-25; all too many merely quote the standard without providing any meaningful analysis. This insubstantial approach is producing a "narrow, grudging" application unbefitting such an important constitutional guarantee.

D. Petitioner's prior unsuccessful mistrial motion based on a trial judge's flagrant errors does not operate as consent to a later mistrial declared by the judge for which there was no manifest necessity.

This case also provides an opportunity for this Court to confirm that a defendant does not waive double jeopardy protections by unsuccessfully objecting and requesting a mistrial based on a trial judge's repeated and flagrant errors during jury deliberations. After several hours of deliberation, Petitioner's jury sent the judge a note that said "[w]e have a hung jury at this time. Please instruct us." App. 91. After

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[17] *Contrast State v. Leath*, App. 1 *with United States v. Huang*, 960 F.2d 1128 (2d Cir. 1992); *Long v. Humphrey,* 184 F.3d 758, 761 (8th Cir. 1999); *United States v. Pierce*, 593 F.2d 415 (9th Cir. 1979); *Walk v. Edmondson*, 472 F.3d 1227 (10th Cir. 2007).

discussing the matter with counsel, the judge and defense counsel agreed that a mistrial based on deadlock was not appropriate. App. 92. When the judge indicated he would recharge the jury, defense counsel expressed concern, requested that the judge avoid any instruction that would single out or pressure the individual jurors, and suggested that the judge inquire whether further deliberations would be "helpful" or "fruitful." App. 94.[18] But when the judge addressed the jury, his instruction violated the

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[18] Any judicial action that may have the effect of coercing an individual juror or inducing a jury to reach a verdict is prohibited in Tennessee. *Parrish v. State*, 80 Tenn. 665 (1883).

> [W]hen a jury's deliberations have not produced a verdict, and it returns to the courtroom and so reports, the presiding judge should admonish the jury, at the very outset not to disclose their division or whether they have entertained a prevailing view. The only permissive inquiry is as to progress . . . [and] if the trial judge feels that further deliberations might be productive, he may give supplemental instructions in accordance with subsequent portions of this opinion.
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> . . .
>
> In our view, the *Allen* charge and the *Allen-Simmons* charge operate to embarrass, impair and violate the constitutional right to trial by jury. . . . [T]he interests of justice demand the rejection of the 'dynamite' charge. . . . [T]rial courts in Tennessee, when faced with deadlocked juries, [must] comply with the ABA Standards Relating to Trial By Jury, Sec. 5.4. . . . Strict adherence is expected and variations will not be permissible.

Kersey v. State, 525 S.W.2d 139, 141-45 (Tenn. 1975).

prescribed procedure.[19] The judge used the words "negotiation" and "compromise," necessitating defense counsel's objection and motion for mistrial, which the judge denied. App. 98; *see State v. Davis*, 266 S.W.3d at 908 (noting impropriety of encouraging compromise verdicts because a compromised verdict dilutes the unanimity requirement) (citations omitted). Counsel reproduced his oral motion in writing and filed it the next day. App. 116. Both the oral and written motions, based entirely upon the judge's infringement of well-established state law regarding jury instructions, were denied. App. 101, 116.

The next day, following several additional hours of deliberation, the jury advised the judge that it had "no further possibility of compromise."[20] App. 111. The

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[19] Rather than repeat the required instruction, the judge prodded the foreperson to reveal whether there was "room to listen . . . with an eye toward reaching an agreement." As the judge and foreperson discussed the situation, the foreperson hinted at the division, referring to those who were not in agreement as "some," "those people," and "the dissenting party." The foreperson also referred to the division as "very lopsided." The trial judge then asked the entire panel whether there was "room for further *negotiation* . . . room for further *compromise*" and stated that his "preference would be that you go back and . . . see if you can *resolve your differences*. . . . App. 99 (emphasis added). While these instructions may not be problematic in some jurisdictions, they violate the strict procedures required in Tennessee.

[20] The jury's note advising the judge that they were hopelessly deadlocked stated that "the jury remains hung with no *further* possibility of *compromise*." App. 111 (emphasis added).

judge commended the jury and summarily declared a mistrial *sua sponte* without conferring with counsel and without complying with the mandatory requirements of Tennessee's sequential verdict system. App. 112.

Ordinarily when a mistrial is *granted* at the defense request, a retrial is not barred because defendant has elected to "forego his valued right to have his guilt or innocence determined by the first trier of fact." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (plurality) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1987)). That rule has no viability in this case because the motion for mistrial was *denied*. Once the court denied the motion, defendant was required to proceed with the case, facing all the various circumstances that might arise until a verdict was reached. The earlier motion – prompted by quite different circumstances existing at the time the motion was made – was not consent to the later-declared mistrial and did not waive defendant's double jeopardy rights, regardless of ensuing circumstances.

The rule that applies when a defendant consents to a mistrial is based on the premise that a requesting defendant who has opted to "forego [the] right to have [ ] guilt or innocence determined before the first trier of fact," *United States v. Scott,* 437 U.S. at 93, has retained "primary control over the course to be followed. . . ." *Oregon v. Kennedy*, 456 at 676; *see also United States v. Dinitz*, 424 U.S. at 609. But that premise does not apply when an earlier motion for mistrial is denied. When Petitioner's counsel

unsuccessfully moved for mistrial based on the trial judge's erroneous jury instruction, counsel retained no control over his decision;[21] rather, he was confronted with a pure "Hobson's choice." *Oregon v. Kennedy*, 456 U.S. at 670 (quoting appellate court's characterization of defense counsel's dilemma as a "Hobson's choice"). Either counsel objected, preserved the error for appeal, and protected the jury from further coercive influences (which likely would have inured to his client's disadvantage), or counsel acquiesced in the error by not objecting.[22] Counsel's objection during this earlier stage of deliberation was not consent to the judge's *sua sponte* grant of a mistrial after several additional hours of deliberation. When the judge declared the jury deadlocked and ordered a mistrial, defense counsel was entitled to expect the judge to follow Tennessee's mandatory jury deadlock procedure. Tenn. Sup. Ct. R. 10, Code of Judicial Conduct Rule 1.1 (providing that a judge "shall comply with

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[21] If control refers to having the power and authority to make a reasonable choice among alternatives, counsel had no control.

[22] Failure to object is detrimental during initial appeals and on collateral review. *See Lowenfield v. Phelps*, 484 U.S. 231, 240-41 (1987) (noting that defense counsel's failure to object to dynamite instruction "indicates that the potential for coercion argued now was not apparent to one on the spot"); *but see Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985) (noting that despite Florida's contemporaneous-objection rule, "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims.").

the law"). As a result, counsel had no reason to object because the court's inquiry would inform the parties whether a verdict had been reached on any of the charges. Yet the appellate court reached the anomalous conclusion that counsel, by not objecting, acquiesced in the illegal discharge of the jury.[23] The wrongful application of consent and acquiescence principles to bar Petitioner's double jeopardy claim results in a circumvention of this Court's manifest-necessity jurisprudence and converts "defendant's valued right to complete his trial before the first jury" into a "hollow shell." *Oregon v. Kennedy*, 456 U.S. at 673.

IV. A jury instruction that required the jury to determine "if" they believed Petitioner's alibi evidence before they could consider the evidence shifted the burden of proof in violation of due process of law.

The most fundamental edicts of our criminal justice system are the presumption of innocence and

[23] The appellate court's opinion on this issue is puzzling. First, counsel cannot acquiesce in an illegality. *Cf. Stephenson v. Carlton*, 28 S.W.3d 910, 912 (Tenn. 1978) (noting that parties cannot agree to illegal sentence). Additionally, Tennessee courts generally do not apply the waiver-by-acquiescence rule when the trial judge violates mandatory rules or statutes. *See e.g., State v. Mounce*, 859 S.W.2d 319 (Tenn. 1993); *State v. Skelton*, 77 S.W.3d 791 (Tenn. Crim. App. 2001). Finally, an objection would have had no effect since discharged juries in Tennessee may not be reconstituted. *See State v. Curtis*, 24 Tenn. 601 (1845).

the reasonable-doubt standard. *In re Winship*, 397 U.S. 358 (1970). Jury instructions that weaken the prosecution's burden of proof or shift the burden to the defense violate due process. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that jury instruction that "the law presumes that a person intends the ordinary consequences of his or her voluntary acts" violates due process). The standard for determining whether a jury instruction misinforms a jury is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991). If the jury *may have* interpreted the instruction as shifting the burden of proof, then the instruction violates due process. *See Sandstrom v. Montana*, 442 U.S. at 524 (applying standard to burden-shifting instructions).

A. Historically, jury instructions related to alibi evidence have conflicted with a defendant's due process rights.

In the past, two related misimpressions concerning alibi evidence led courts to use constitutionally infirm jury instructions that undermined the presumption of innocence and shifted the burden of proof. The first misimpression was that alibi was an affirmative defense that had to be proved by the

defendant.[24] The second treated defense evidence generally as inferior evidence and demanded that the jury apply special scrutiny.[25] Jury instructions often advanced these misimpressions by disparaging alibi proof or placing the burden of establishing an alibi on the defendant. *See* Frank D. Wagner, Annotation, *Propriety and Prejudicial Effect of Instructions on Credibility of Alibi Witnesses*, 72 A.L.R. 3d 617 (1976).

In time, courts began to recognize that defendant's non-involvement in the crime is not a defense at all, but is simply a denial of the accusation. *See* 1 WHARTON'S CRIMINAL EVIDENCE § 2:11 (15th ed. 2013) (stating that alibi is a "point of evidence"); *State v. Landa*, 642 N.W.2d 720, 724 (Minn. 2002) (holding that "an alibi is proof that a necessary element of the state's case does not exist"); *State v. McGuire*, 795

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[24] *See e.g.*, *Simmons v. Dalsheim*, 543 F.Supp. 729 (S.D.N.Y. 1982); *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989); *People v. Victor*, 465 N.E.2d 817 (N.Y. 1984); *Daniels v. State*, 329 A.2d 712 (Md. App. 1974); *State v. Alexander*, 245 S.E.2d 633 (W.Va. 1978), *overruled on other grounds*, *State v. Kopa*, 311 S.E.2d 412 (W.Va. 1983); *contra Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853 (1982); *Robertson v. Warden*, 466 F.Supp. 262 (D. Md. 1979), *aff'd*, 624 F.2d 1095 (4th Cir.), *cert. denied*, 449 U.S. 961 (1980); *Doisher v. State*, 632 P.2d 242 (Alaska Ct. App. 1981); *Jackson v. State*, 374 A.2d 1 (Del. 1977); *Williams v. State*, 671 P.2d 635 (Nev. 1983); *Miller v. State*, 660 S.W.2d 95 (Tex. Crim. App. 1983); *State v. Romero*, 554 P.2d 216 (Utah 1976).

[25] *See e.g., United States v. Robinson*, 602 F.2d 760 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979); *Burtnett v. United States*, 62 F.2d 452 (10th Cir. 1932); *People v. McCoy*, 220 N.W.2d 456 (Mich. 1974).

P.2d 996, 1005-06 (N.M. 1990) (noting that alibi is "an attempt to cast doubt on the proof of the elements of the crime"). Despite this clear trend, Tennessee courts continue to use a jury instruction that subjects alibi evidence to greater scrutiny, shifts the burden of proof to the defense, and violates due process of law. T.P.I. Crim. 42.13.

B. Issues related to defense evidence continue to generate sharp division among courts.

In order to escape the unfairness occasioned by the historical mistakes, some courts have revised their jury instructions[26] while others have declined to instruct the jury about alibi altogether.[27] But most

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[26] *See e.g., State v. Rodriguez*, 961 P.2d 1006, 1011 (Ariz. 1998) (requiring instruction so that jury does not correctly assume that defendant bears burden of proving alibi); *Commonwealth v. McLeod*, 326 N.E.2d 905, 906 n.1 (Mass. 1975) (recommending federal instruction); *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994) (requiring jury to be informed that defendant "does not have to establish the truth of the alibi to your satisfaction").

[27] States that *do not* provide alibi instructions include: Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, New Hampshire, New Mexico, and Washington. *See e.g.*, *Harkness v. State*, 590 S.W.2d 277 (Ark. 1979) (holding that no jury instruction on alibi should be given); *Iles v. Commonwealth*, 455 S.W.2d 533 (Ky. 1970) (holding that error did not occur because alibi instruction was unnecessary); *State v. Kim*, 773 A.2d 1051, 1054 (Me. 2001) (declining to require alibi instruction).

states have revised their jury instructions to remove any language that disparages alibi proof or suggests that any burden of proof rests on the defense.[28] The most common instruction used in these jurisdictions informs the jury that they must acquit defendant if they have a reasonable doubt based on all the evidence as to whether defendant was present at the time and place the alleged offense was committed. *See e.g.*, *Commonwealth v. Begley*, 780 A.2d 605, 629 (Pa. 2001); *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998).

Prompted by concern that the jury will become confused about the burden of proof when alibi evidence is

[28] The following states provide alibi instructions when requested: Alaska, Arizona, Connecticut, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Massachusetts, Maryland, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and West Virginia. *See e.g.,* Alaska Pattern Jury Instruction 1.40; Arizona Standard Criminal 43; Connecticut 2.7-2; California CALJIC 4.50; Delaware Crim. Pattern Jury Instruction 5.61; Florida Pattern Jury Instruction 3.6(i); Georgia Pattern Jury Instruction 3.30.10; Hawaii Pattern Jury Instruction 7.14; Idaho Criminal Jury Instruction No. 1502; Iowa Criminal Instructions, 200.15; Maryland Pattern Jury Instruction – Criminal 5:00; Mississippi Model Jury Instructions – Criminal § 2.1; Montana Criminal Jury Instruction No. [2-119]; Nebraska Jury Instruction 2d Crim. 8.1; New Jersey Model Criminal Jury Charge "Alibi"; North Dakota Criminal Pattern Jury Instruction, K-305; Ohio Criminal Jury Instructions 421.03; Oklahoma Uniform Jury Instructions Criminal 8-57; Pennsylvania Suggested Standard Criminal Jury Instruction 3.11; Texas Crim. Jury Charges § 3:390 ALIBI; Virginia Practice Jury Instruction § 63.1.

offered, some jurisdictions specify that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. *Commonwealth v. McLeod*, 326 N.E.2d 905, 906 n.1 (Mass. 1975). Other courts, concerned that lay jurors may interpret defendant's faulty alibi as proof of guilt, have added instructions to assure that the jury does not find the defendant guilty based on their disbelief of the alibi evidence. *See United States v. Burse*, 531 F.2d 1151, 1153 (2d Cir. 1976) (noting that instruction must avoid the "danger that the failure to prove [alibi] will be taken as a sign of the defendant's guilt."); *United States v. Braxton*, 877 F.2d 556, 563 (7th Cir. 1989) (instructing that "burden of proving defendant's guilt does not shift from the government"); *State v. Rodriguez*, 961 P.2d 1006, 1011 (Ariz. 1998) (concluding that standard burden of proof instructions did not "redress the risk of burden shifting engendered by alibi evidence").

Even among the federal circuits, there is variation in the alibi instruction. *Compare United States v. Simon,* 995 F.2d 1236, 1240 (3d Cir. 1993) *with United States v. Webster*, 769 F.2d 487, 490 (8th Cir. 1985). Some federal courts designate their alibi instruction as an instruction on "defendant's non-involvement," cautioning that the "popularization of the term 'alibi' has led to a negative connotation and [may lead to confusion] about the burden of proof." 1A Fed. Jury Prac. & Instr., Comment (6th ed.); 10th Cir. Pattern Jury Instructions. *See also* Indiana Model Jury

Instruction – Criminal No. 10.21 (noting that while no instruction should generally be given, if one is given, "the term 'alibi' [should] not be used, first to avoid having to define it and second, because it may have a negative connotation for the jury"; also recommending that the term "defense" not be used).

C. The Tennessee jury instruction used in this case subjected the alibi proof to greater scrutiny and impermissibly shifted the burden of proof to Petitioner.

Although Tennessee has acknowledged the propriety of an instruction that properly classifies presence at the scene as an element of the state's proof, T.P.I. Criminal 42.13(a), the judge in this case chose[29] instead to use Tennessee's disfavored instruction, which suffers from both misimpressions about alibi evidence. This choice was particularly problematic because Petitioner challenged the state's ability to place her at the scene of her husband's death and introduced many witnesses who related detailed

[29] Tennessee has two pattern jury instructions pertaining to alibi. The one used in this case is found in T.P.I. Criminal 42.13. App. 142. The other instruction found in T.P.I. Criminal 42.13(a) removes the offensive "if believed" qualifier and adds a sentence that reduces, but does not entirely, eliminate the disparaging differentiation in the flawed instruction. In Tennessee, pattern jury instructions are offered only as suggestions for the trial courts. *See State v. Hodges*, 944 S.W.2d 346, 354 (Tenn. 1997).

encounters that they had with Petitioner at the time of and at some distance from the victim's death.

The judge instructed the jury that "alibi is evidence which, *if believed*, would establish that the defendant was not present at the scene of the alleged crime when it allegedly occurred." App. 142 (emphasis added). This instruction required the jury to first *believe* that Petitioner had successfully established an alibi *before* they could find her not guilty. In this way, the instruction replaced the state's burden of proving that Petitioner *was* at the scene with Petitioner's burden of proving she *was not* at the scene. Despite the wide differences in how jurisdictions treat evidence of alibi, thorough research has uncovered **no** jurisdiction that uses a jury instruction like the one used by the Tennessee trial court in this case.[30] Yet the courts in Tennessee continue to use this instruction which shifts the burden of proof on the most essential element of a criminal case in clear violation of federal constitutional law.

In addition to shifting the burden of proof, the jury instruction advanced the other historical mistreatment of alibi proof by subjecting alibi evidence to special scrutiny. The constitutional infirmity began with the first sentence, which informed the jury that the "defendant has presented evidence of an alibi,"

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[30] Jury instructions have been located and reviewed for every state except Nevada, Oregon, Rhode Island, South Carolina, South Dakota, Wisconsin, and Wyoming.

differentiating alibi evidence from all other proof and aligning it exclusively with Petitioner. *Id*. The instruction then subjected the alibi evidence to the "if believed" qualifier applied only to the alibi evidence. In addition to prohibiting the jury from considering any impact the alibi evidence had on the state's case until and unless the evidence scaled the "if believed" threshold, this part of the instruction also required that Petitioner prove her alibi. *See United States v. Marcus*, 166 F.2d 497, 503-04 (3d Cir. 1948) (requiring that jury be instructed that "government's burden of proof covers the defense of alibi").

The instruction also suffers from internal inconsistencies. The first sentence of the instruction advised that if the jury[31] believed the alibi evidence the defendant could not *be* guilty, while the second sentence instructed that if the state failed to meet its burden, the jury must *find* the defendant not guilty. *Id*. The two paragraphs are not linked by any combined process or unifying term, but rather delineate two discrete steps: Step 1: do you believe the evidence of alibi? Step 2: did the state meet its burden of proof? Only Step 1 uses the word "alibi." No word or

[31] The instruction did not clarify who had to believe, who had to be believed, or how belief was to be determined. Was belief an individual determination or did the jury, as a whole, have to believe the evidence? If the latter, was the jury required to vote on whether they believed the evidence? If the former, what happened if only some jurors believed the evidence? Since the defense presented more than one alibi witness, must all of the witnesses be believed for the alibi evidence to be believed?

phrase in Step 2 connects this part of the instruction to either Step 1 or to alibi. When read or heard by a layperson, these two paragraphs seem to address totally separate topics, the first of which establishes a standard for the defense proof of alibi and the second of which defines the state's burden of proof. Moreover, the conclusions that the jury may reach after following the two steps are not the same. Step 1, if believed, leads to a determination that defendant cannot *be* guilty, while Step 2 results in a determination that the jury *must find* defendant not guilty. The confusion caused by the instruction was exacerbated by the organization of the instructions. The judge inserted the alibi instruction, as a postscript, between the lengthy general instruction and counsel's closing arguments. App. 140. Moreover, as demonstrated above, when the alibi jury instruction in this case is read in conjunction with the entire jury charge, the constitutional error is compounded.

In reviewing the flawed instruction, the Tennessee appellate court relied upon the entirety of the charge and did not otherwise analyze the constitutional issue raised.[32] But reading irreconcilable instructions together cannot cure their constitutional infirmity. "Language that merely contradicts and does

[32] Because special scrutiny was not required of any other evidence in the case, reading the alibi instruction in conjunction with the entire jury charge actually exacerbates the instruction's flawed effects.

not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

Reading the entire instruction cannot salvage the alibi instruction from its burden-shifting effect. As this Court has noted, "reading a jury instruction as a whole" is not a panacea to a constitutionally defective charge. *Id.* at 319-20; *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam). Particularly, an inappropriate alibi instruction is not "cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond a reasonable doubt." *United States v. Simon*, 995 F.2d 1236 (3d Cir. 1993) (quoting *United States v. Barrasso*, 267 F.2d 908, 910-11 (3d Cir. 1959)).

The burden-shifting instruction used by the Tennessee courts is inconsistent with the overwhelming weight of authority regarding alibi evidence and conflicts with well-established principles of constitutional law. Moreover, the use of a faulty alibi instruction in Petitioner's case was extremely harmful because her presence at the scene of her husband's death was the essential jury issue.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to assure that the fundamental guarantees

of the right to trial by jury, the guarantee against double jeopardy, and the presumption of innocence are honored in all of America's courts.

Respectfully submitted,

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IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2012 Session

**STATE OF TENNESSEE v.
RAYNELLA DOSSETT LEATH**

**Appeal from the Criminal Court for Knox County
No. 85787 Richard R. Baumgartner, Judge**

No. E2011-00437-CCA-R3-CD

(Filed Jun. 3, 2013)

Following a jury trial, the Defendant, Raynella Dossett Leath, was convicted of first degree premeditated murder and sentenced to imprisonment for life, with the possibility of parole. *See* Tenn. Code Ann. § 39-13-202. In this appeal as of right, the Defendant contends (1) that she was retried in violation of her state and federal constitutional protections against double jeopardy; (2) that the trial court erred by declining to exclude test results from analysis of the victim's blood and urine; (3) that the trial court erred by admitting "certain estate planning documents" into evidence at trial; (4) that the trial court erred by denying the Defendant's motion for a mistrial after a witness testified that she had previously stated that she was "scared" of the Defendant; (5) that the evidence was insufficient to sustain the Defendant's conviction for first degree premeditated murder; (6) that the trial

court erred by failing to instruct the jury on the State's duty to preserve evidence pursuant to *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999); (7) that the trial court's jury instruction regarding the defense of alibi improperly shifted the burden of proof onto the Defendant; (8) that the trial court erred by failing to instruct the jury on the Defendant's "theory of defense"; (9) that the trial court used an improper method to select the alternate juror; (10) that members of the jury committed misconduct by deliberating prematurely and reviewing extraneous prejudicial information; (11) that the State withheld evidence favorable to the Defendant in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny; (12) that the Defendant is entitled to a new trial based upon newly discovered evidence; (13) that the trial court, by accepting the jury's guilty verdict, "abdicated" its role as the thirteenth juror; and (14) that the Defendant is entitled to a new trial based upon cumulative error.[1] Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

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[1] For the purposes of clarity and brevity, we have renumbered and reordered the issues as stated by the Defendant in her brief.

James A.H. Bell, Knoxville, Tennessee (at trial and on appeal); John Wesley Hall, Little Rock, Arkansas (on appeal); Paula R. Ham, Loudon, Tennessee (at trial); Richard L. Holcomb, Honolulu, Hawaii (at trial), for the appellant, Raynella Dossett Leath.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Robert Steven Bebb, District Attorney General, pro tem; and Richard A. Fisher, Cindy LeCroy-Schemel, and Joseph Y. McCoin, Assistant District Attorneys General, pro tem, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND[2]

I. State's Evidence

A. Police Investigation

Shortly before 11:30 a.m. on March 13, 2003, the Knox County Emergency Communications District received a 911 call from a residence belonging to the Defendant and her husband, David Leath. When the

[2] This case has a long and complex procedural history. The victim was killed in March 2003. The Defendant was not indicted until November 2006. The Defendant was first tried from March 2 to 12, 2009. However, that trial resulted in a mistrial. Numerous pre- and post-trial motions were filed involving the second trial. This section will discuss only the factual background regarding the Defendant's conviction. The factual background of the Defendant's procedural issues will be discussed in other portions of this opinion.

911 operator answered the phone call, the Defendant repeatedly asked the operator to help her before telling the operator that her husband "shot himself." The operator asked the Defendant where her husband was located, and the Defendant stated that he was "in the bed." The Defendant implored the operator to "please hurry" and stated that she was "going to vomit." The Defendant then began screaming incoherently and crying for a few brief moments. After that, the telephone line remained open, but the Defendant did not respond to the 911 operator and could no longer be heard in the background.

Sergeant David Amburn of the Knox County Sheriff's Office (KCSO) testified at trial that he and Assistant Chief Deputy L. Keith Lyon[3] were the first officers to arrive at the Defendant's residence. When they arrived, the front door "was standing open," and the Defendant was lying face down in the front yard "motionless" and not making any sounds. Sgt. Amburn "nudged [the Defendant] with [his] foot" and said, "Ma'am." The Defendant then "started crying heavily" to the point where she "couldn't catch her breath." Sgt. Amburn helped the Defendant up, and she "started yelling uncontrollably." Sgt. Amburn recalled at trial that the Defendant "had some kind of hand towel . . . that she might have been sobbing with." However, Sgt. Amburn could not remember if the Defendant "had any blood on her."

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[3] Chief Lyon was killed in an automobile collision several years prior to the Defendant's trial.

Sgt. Amburn testified that, after he got the Defendant up, she "was totally out of it," "really uncontrollable," and "was very hysterical." Sgt. Amburn recalled that the Defendant asked him to help her husband, told him that her husband had been shot, and told him where her husband was before she started saying "[s]ome stuff that didn't make sense." Sgt. Amburn testified that nothing about the Defendant's behavior seemed "disingenuous" at the time, and he later described the Defendant in his report as having been "overcome by grief." Sgt. Amburn and Chief Lyon then left the Defendant in the front yard "unattended" as they entered the house to check on the victim.

Sgt. Amburn and Chief Lyon went inside and began "to clear the residence." Sgt. Amburn recalled that the house was "very dark," especially in the bedroom where the victim was found. Sgt. Amburn testified that he and Chief Lyon tried "not to disturb anything at all" in the bedroom as they checked on the victim. The victim was lying on his side with a pillow underneath his head and blankets tucked in around his body. Sgt. Amburn testified that it was obvious from looking at the victim that he was deceased. There was a revolver near the victim's hand and pointing away from the victim's head. Sgt. Amburn recalled that there was a "TV tray . . . with maybe a bowl of what looked like oatmeal or something in it, like he'd eaten in the bed earlier." Sgt. Amburn testified that he and Chief Lyon then backed out of the bedroom and "checked the rest of the

residence to make sure" the Defendant was the only other person there.

Sgt. Amburn testified that he and Chief Lyon "cleared" the entire house, checking all of the rooms, closets, and under the beds. Sgt. Amburn could not recall how long it took to check the entire house. When Sgt. Amburn and Chief Lyon had finished, there were other officers at the front door, and the Defendant had been moved from the yard to the front porch. Sgt. Amburn testified that neither he nor Chief Lyon entered the house alone, and he was certain about their actions that day. Sgt. Amburn also recalled that the Defendant's vehicle felt "lukewarm," like it had been driven sometime "in the last couple of hours."

Sgt. Robert D. Lee of the KCSO arrived at the Defendant's residence shortly after Sgt. Amburn and Chief Lyon. However, Sgt. Lee recalled events differently from Sgt. Amburn. According to Sgt. Lee, Chief Lyon was alone in the foyer of the house while Sgt. Amburn was with the Defendant in the front yard. Sgt. Lee recalled that the Defendant appeared to be "pretty upset." According to Sgt. Lee, he rushed into the house because he thought it was tactically unsound for Chief Lyon to be alone in the house. Sgt. Lee testified that he and Chief Lyon then went into the bedroom, checked on the victim, "cleared" the room, and then backed out and waited on the paramedics to arrive. Sgt. Lee recalled that the blood on the victim "was jelled." Both Sgt. Lee and Sgt.

Amburn testified that to their knowledge, no one moved the victim's body or touched the gun.

Sgt. Lee testified that he "secured the scene" and stationed himself at the front door. Sgt. Lee started a "crime scene log" to keep track of everyone who entered the Defendant's house that afternoon. Sgt. Lee testified that Chief Lyon walked the paramedics into the bedroom and that they confirmed that the victim was dead. Sgt. Lee recalled that there were a lot of people on the Defendant's property that afternoon, including approximately thirty "civilians" who congregated at a barn near the residence. However, Sgt. Lee testified that none of these "civilians" were allowed into the Defendant's house or near the crime scene.

Detective Sergeant Perry Moyers of the KCSO testified at trial that he was the lead detective in this case. When Det. Moyers arrived at the Defendant's home, Chief Lyon and Sgts. Amburn and Lee gave him a "quick" assessment of the situation. Det. Moyers was told that nobody had touched anything and "that everything was as it was when [they] got there." Det. Moyers noticed a bullet hole in the headboard of the victim's bed. The bed was later removed, and a bullet was recovered from the wall, approximately twenty inches above the floor. There was also a bullet hole in the mattress near the victim's body and the gun. Bullet fragments were later recovered from the bed frame and underneath the bed.

Det. Moyers observed that the victim had an entrance wound just above his left eyebrow. The victim's body was lying on his right side with his right arm outstretched and the gun was "right next to" his left hand. Det. Moyers noted that lividity, the settling of blood in the lower portions of the body after death, had begun to set in, but had not yet become "fixed." Det. Moyers opined that this meant the victim had been dead for more than thirty minutes but less than five or six hours. The blood had started to pool on the bed and the floor beneath it. Det. Moyers recalled that the blood on the victim and the bed appeared to be dried except for some blood still pouring out of the victim's nose. There was a pillow "between [the victim's] head and his shoulder." The victim also had sheets "tucked in around him up and down." There was no blood on the left side of the bed.

The gun found next to the victim's body was a Colt .38 caliber "police special" revolver. Det. Moyers removed the gun from the victim's bed. Upon visual inspection, there were no signs on the gun of "blow back," blood spatter and material that sprays when a person is shot while the barrel of the gun is in contact with the skin or from a very close range. Det. Moyers opened the gun's cylinder and was careful to insure that the cylinder did not move when he opened it. The cylinder contained three live rounds and three spent shell casings. The cylinder rotated clockwise, and at the top of the cylinder was a spent Western shell casing, then two spent Remington shell casings, one live Remington round, and two live Western rounds.

No fingerprints were found on the gun and the live rounds, spent casings, and spent bullets were not tested for fingerprints.

There were no signs that there had been a struggle in the victim's bedroom, but Det. Moyers testified that based upon the evidence at the scene, he began to suspect the victim's death was not a suicide. Det. Moyers believed that the blood spatter on the wall was not consistent with the victim's having been shot where his body was lying. Measurements and photographs of the blood spatter were taken for later analysis. Det. Moyers also noticed that the gunpowder around the bullet hole in the mattress appeared to be undisturbed. Based upon this, Det. Moyers concluded that the victim's body was in the position it was found in and the sheets were tucked in around the body before the shot was fired into the mattress. Samples were taken from the hands of both the Defendant and the victim to test for gun shot residue. The Defendant also gave Det. Moyers the clothes she and her daughter had been wearing that day for forensic tests to be performed.

Three latex gloves were found on a shelf over a toilet in a bathroom adjoined to the victim's bedroom. An open Bible was also found on a counter near the sink in the bathroom. The police did not search any other rooms in the house besides the bedroom and the adjacent bathroom. The police did check the house for signs of a break-in because the Defendant told Det. Moyers that she had "secured the place" before she left and that "when she came back home, it was still

secure." There were no signs of a break-in, but none of the KCSO officers who testified at trial recalled checking to make sure the doors were actually locked. The Defendant originally told Det. Moyers that "she did not know where the gun came from" or who it belonged to, but she later told Det. Moyers that she thought the gun had belonged to the victim's deceased father.

Det. Moyers was told that the victim "had some medical problems" and was depressed because his mother had a terminal illness. When Det. Moyers asked the Defendant for the name of the victim's doctor, she voluntarily gave Det. Moyers an appointment calender [sic] that had "information for the doctor appointments and stuff." The calender [sic] had numerous entries, not all of them pertaining to the victim. There were several entries from the end of January to March 8, 2003, in which the Defendant described the victim as being "hateful," "controlling," and "paranoid." The Defendant also stated in a couple of entries that the victim had "stayed in bed all day" or that he had made her cry.

In an entry dated March 8, 2003, the Defendant stated that the victim had "slurred speech," was "hateful," and had "stayed in bed all day." The victim's daughter, Cindy Wilkerson, testified that on March 8, 2003, the Defendant and the victim had gotten into an argument about "feeding the cows" and that the Defendant told her that "she was going to teach [the victim] a F'ing [sic] thing." However, the victim's neighbor, Roger Yarnell, testified that he had

never witnessed any problems between the victim and the Defendant.

At trial, several witnesses described the victim as having been "laid-back," "carefree," and "a fun-loving guy." Friends and family of the victim testified that they observed no deterioration in the victim's mental or physical health in the months before his death. However, it was established at trial that the victim was a private man who seldom spoke about his health or personal matters. The victim's neighbor, Mr. Yarnell, also testified that the victim was "[v]ery emotional" about his mother's ill health. Mr. Yarnell testified that he was supposed to meet with the victim to pick up some mulch around noon on March 13, 2003. According to Mr. Yarnell, the victim was always on time and had never called off a meeting before.

Ms. Wilkerson testified that she had a strained relationship with the Defendant and that the Defendant "was always distant" towards her. Due to their poor relationship, Ms. Wilkerson thought it was extremely odd when the Defendant called her at work just before 10:00 a.m. on March 13, 2003. Ms. Wilkerson testified at trial that the Defendant had "never called [her] at work" before. Ms. Wilkerson worked at the same barbershop as the victim, and the Defendant asked her if the victim had "stopped by to talk to [her]." Ms. Wilkerson told the Defendant that she had not spoken to the victim that morning, and the Defendant said that the victim "didn't eat his oatmeal [that] morning" and that she guessed "he was just going to go work out on an empty stomach."

Ms. Wilkerson testified that the Defendant told her she was at the hospital visting [sic] the victim's mother, Mayme Leath, and bringing her some flowers from Mrs. Leath's home. The Defendant then put Mrs. Leath on the line, and Ms. Wilkerson spoke to her briefly before hanging up to return to work.

Ms. Wilkerson testified that she thought something was "wrong" and that "something just wasn't right about the conversation." Ms. Wilkerson thought that the Defendant's voice "didn't sound right" and that she seemed too "chipper." Ms. Wilkerson testified that while she visited Mrs. Leath in the hospital every day, the Defendant rarely visited Mrs. Leath and had never brought her flowers before. Ms. Wilkerson also testified that it was odd for the Defendant to be in a hospital because she had a "liver condition" and "wasn't supposed to be around any sick people." When the Defendant had to be in a hospital, she would wear a mask over her face. Ms. Wilkerson did not find out about her father's death until around 2:00 p.m. when the Defendant's son-in-law came to her barbershop and asked her to leave with him.

Ms. Wilkerson testified that when she got to the victim's house, the Defendant told her the victim "had committed suicide." Ms. Wilkerson asked the Defendant how the victim could have done that, and the Defendant responded, "Well, he killed cows." Ms. Wilkerson testified that her father "would never have hurt his face . . . [and] would have been afraid that he would have been a vegetable." According to Ms.

Wilkerson, the gun used to kill the victim had belonged to the victim's father, and she had seen it, along with a holster, at Mrs. Leath's house several years before the victim's death. Gordon Armstrong, a friend of the victim's, testified that he also recognized the gun as having belonged to the victim's father because he had previously used the gun to kill a dog for the victim's family. Mr. Armstrong further testified that the victim had access to the gun, "but he wouldn't fool with it because he didn't like handguns."

James A. Safewright testified that he owned a "cremation company" and that he met with the Defendant on March 1, 2001. The Defendant met with Mr. Safewright by herself and paid in full to make "prearrangements" for the cremations of herself and the victim. Mr. Safewright recalled that the Defendant told him that the victim "had been in ill health." Mr. Safewright testified that the victim's body had been released to him after an autopsy was performed and that he cremated the body March 14, 2003. Mr. Safewright also testified that the Defendant still had a valid contract with him to cremate her body upon her death.

Randall Carr testified that in 2003 he was the director of human resources at Parkwest Hospital. Mr. Carr testified that on March 19, 2003, he had a "pretty unusual" meeting with the Defendant. According to Mr. Carr, the Defendant came to the hospital that morning wearing "a clinical mask [] over her face," which she removed once she had been shown to a conference room. The Defendant had her daughter

and a private investigator with her and was at the hospital because she had requested to interview several hospital employees. As one of the interviews was concluding, the Defendant "gave the impression that something had just popped into her mind."

Mr. Carr testified that the Defendant stated that she remembered meeting and speaking with a physical therapist who was working with Mrs. Leath on the morning of the victim's murder and "that must be noted in the medical records somewhere." The Defendant also stated that she remembered making a phone call to the victim "to cheer him up" in front of the physical therapist. Mr. Carr testified that the Defendant told him that the victim "didn't answer" and then she "started crying."

Mr. Carr testified that he checked Mrs. Leath's medical records, and the physical therapist made a notation "about seeing [the Defendant] that morning" at 9:53 a.m. on March 13, 2003. However, there were several entries in Mrs. Leath's chart at 9:53 a.m., and it was possible that the physical therapist met with Mrs. Leath earlier in the morning. Mr. Carr testified that there were also references in Mrs. Leath's medical records to the Defendant's having previously discussed Mrs. Leath's care with hospital employees. Ms. Wilkerson testified that she was unaware that documents from the hospital showed that the Defendant had visited Mrs. Leath in the past and was involved in decisions about Mrs. Leath's care.

A few weeks after the victim's murder, Ms. Wilkerson found an empty holster in Mrs. Leath's underwear drawer. Ms. Wilkerson turned the holster over to Det. Moyers. Det. Moyers testified at trial that the gun found beside the victim fit inside the holster. The holster was tested for fingerprints, and four latent fingerprints were found but were not of sufficient quality to make an identification. Ms. Wilkerson testified that the Defendant had Mrs. Leath's pocketbook and house keys prior to the victim's murder. According to Ms. Wilkerson, the Defendant only visited Mrs. Leath in the hospital once after the victim's death, and that was to return Mrs. Leath's pocketbook and house keys. Ms. Wilkerson also testified that on March 20, 2003, the Defendant came to her barbershop and told her that Mrs. Leath was "no more than a neighbor to her, and that [Mrs. Leath] was [Ms. Wilkerson's] responsibility because [she] was next of kin." Mrs. Leath died approximately a month after the victim was killed.

Charles Child testified that he was a licensed attorney whose practice focused on "people problems" such as estate planning and family law. Mr. Child testified that the victim had been a long time client of his and that he had drafted wills for the victim and the Defendant. In 1993, after the victim married the Defendant, he had a will drafted which named the Defendant as the administrator of his estate and left all of his property to Mrs. Leath and Ms. Wilkerson. Mr. Child testified that in 1996, the victim had his previous will destroyed and had a new will drafted

which left everything to the Defendant and gave Mrs. Leath a life estate in a portion of his real property. The will left nothing for Ms. Wilkerson. In 1996, the Defendant had a will drafted that mirrored the victim's, leaving her entire estate to him.

Mr. Child also testified about a series of three quitclaim deeds executed in 1999. Mr. Child testified that the documents appeared to have been self-drafted, and two of the deeds stated that they had been prepared by the Defendant. The deeds took real property that had been owned by the victim and the Defendant individually and transferred the property's ownership to the victim and the Defendant jointly. The deeds made the victim and the Defendant tenants by the entireties with a right of survivorship in the new joint property. Mr. Child explained that based upon the quitclaim deeds, if the victim died, the Defendant would become the sole owner of all the property covered under the quitclaim deeds. Mr. Child further explained that the quitclaim deeds ensured that the Defendant would inherit all of the victim's real property regardless of what was stated in the victim's will. However, Mr. Child noted that the victim's will would control how the remaining portions of the victim's estate would be divided.

Mr. Child testified that he last saw the victim on February 4, 2003. The victim and the Defendant came to his office to discuss the victim's 1996 will. According to Mr. Child, the Defendant did not appear to be upset, but the victim was "agitated, emotional," and "upset" about the 1996 will. Mr. Child testified

that the victim "had questions" about the 1996 will and spoke with Mr. Child about the will without the Defendant present. However, Mr. Child testified that the victim ultimately made no changes to his 1996 will and that he was unaware of any attempts by the victim himself to change the will. Mr. Child testified that he believed the victim wanted his estate governed by the will because the victim did not instruct him to alter or destroy the will. Mr. Child further testified that the victim was aware of what needed to be done in order to invalidate the 1996 will. According to Mr. Child, the victim's will was lost after his death, and only a copy remained. Mr. Child testified that if the victim died without a will, Ms. Wilkerson would have been entitled to a large portion of the victim's estate.

Ms. Wilkerson testified that the Defendant served as the administer [sic] of the victim's estate and that under the victim's will she received nothing and her children received a car and some heirlooms. Ms. Wilkerson admitted that her father never discussed his estate planning with her and that she had sued the Defendant to challenge the victim's will. The Defendant answered the lawsuit by claiming that Ms. Wilkerson had killed the victim.[4] Ms. Wilkerson testified that no one other than the Defendant had ever accused her of murdering her father.

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[4] Ms. Wilkerson's co-worker, Hoyt Vanosdale, testified that Ms. Wilkerson got to work around 7:00 a.m. on the day of the murder.

B. Forensic Evidence

Doctor Darinka Mileusnic-Polchan, the chief medical examiner for Knox County and an expert in forensic pathology and toxicology, testified that on March 14, 2003, she performed an autopsy on the victim's body. Dr. Mileusnic-Polchan testified that the victim appeared to be "a well-built, well-groomed . . . individual who obviously took care of himself" and noted that "he had a quite a bit of hair spray in his hair." According to Dr. Mileusnic-Polchan, the cause of the victim's death "was a close-range gunshot wound" to the victim's forehead, above the left eyebrow. The entrance wound was "a tear-drop shape" suggesting that the bullet entered at "a slightly downward angle."

Dr. Mileusnic-Polchan testified that there was also "a widespread area of stippling or gunpowder tattooing" on the victim's forehead suggesting "the distance between the gunshot wound . . . and the muzzle was several inches." Dr. Mileusnic-Polchan compared the stippling on the victim's forehead to the results from forensic testing in which the gun found beside the victim was fired from several different distances. Dr. Mileusnic-Polchan concluded that the stippling on the victim's forehead matched the stippling pattern created when the gun was fired from twelve inches away from a target. Dr. Mileusnic-Polchan testified that the victim's wound was definitely not a contact wound. Dr. Mileusnic-Polchan further testified that forehead wounds were "extremely rare" in suicides and that it would be "even more

rare" for it to be a suicide with a non-contact wound. It was also noted that the victim was right-handed and blind in his left eye.

Dr. Mileusnic-Polchan testified that the bullet entered the victim's skull, crossed through the left hemisphere of the victim's brain, and severed the victim's brain stem. After severing the brain stem, the bullet then "ricocheted inside the skull" before stopping inside the victim's brain. Dr. Mileusnic-Polchan recovered the spent bullet from the victim's brain during the autopsy. Dr. Mileusnic-Polchan testified that the victim's death was "pretty much instantaneous." Dr. Mileusnic-Polchan further testified that once the bullet severed the victim's brain stem, the victim was unable to move or pull the trigger of the gun. Dr. Mileusnic-Polchan was unable to determine an exact time of death, but she testified that the range for time of death "could be anywhere between just dead to about six hours." Given that there was evidence that "some cooling [had] already occurred" when the body was found, Dr. Mileusnic-Polchan narrowed the range to between "one or two hours to six hours."

Dr. Mileusnic-Polchan examined the victim's brain and found no evidence that the victim suffered from Alzheimer's disease. During the autopsy, Dr. Mileusnic-Polchan found that the victim's stomach was empty, but his bladder was full. Dr. Mileusnic-Polchan took samples of the victim's blood and urine to be tested for alcohol and drugs. There was no alcohol found in the victim's blood. However, the

following drugs were found in the victim's blood: .08 micrograms per milliliter of Demerol; .16 micrograms per milliliter of Sinequan; and .05 micrograms per milliliter of Phenergan. Forensic testing also revealed that the victim had .08 micrograms per milliliter of norpethidine, a metabolite of Demerol, in his blood. All three drugs were prescription medications for which the victim did not have a prescription. There was no evidence at trial that any of these drugs were found in the Defendant's house or that the Defendant had access to these drugs.

Dr. Mileusnic-Polchan testified that Demerol is a sedative primarily used for short-term "moderate to severe pain control," usually for surgery. Dr. Mileusnic-Polchan further testified that the presence of the metabolite norpethidine was evidence of "chronic use" of Demerol for at least "several days." According to Dr. Mileusnic-Polchan, Phenergan is also a sedative used to treat nausea, is frequently added to Demerol to increase its effect, and a combination of the two drugs is often used as a "sedative cocktail" prior to surgery. Dr. Mileusnic-Polchan testified that Sinequan is an antidepressant which, like Demerol and Phenergan, acts as a sedative. Dr. Mileusnic-Polchan further testified that the amount of Sinequan in the victim's blood was outside of the therapeutic range and was bordering on toxic levels. Dr. Mileusnic-Polchan opined that these three drugs taken together were a "very unsafe combination . . . to be used."

Dr. Mileusnic-Polchan testified that the combination of drugs in the victim's blood did not "make him completely unconscious," but caused the victim to be "really out of it" and "really impaired." Dr. Mileusnic-Polchan opined that based upon the level of drugs in the victim's blood, he could not have gotten out of bed that morning, gone to work, or driven a car. Dr. Mileusnic-Polchan testified that she did not know how the drugs got into the victim's system but theorized that they could have been mixed with food and ingested or injected into the victim. However, Dr. Mileusnic-Polchan did not find any needle marks on the victim's body. Dr. Mileusnic-Polchan testified that the victim could have ingested the drugs with "relatively light food" the night before his death and still have had an empty stomach at the autopsy. Based upon the evidence from the autopsy and forensic analysis of the victim's blood, Dr. Mileusnic-Polchan concluded that the victim's death was a homicide rather than a suicide.

Paulette Sutton, a retired forensic scientist and an expert in "blood stain pattern analysis," testified that she reviewed photographs of the crimes [sic] scene as well as photographs and measurements of the blood spatter on the bedroom wall. Ms. Sutton testified that based upon the evidence she reviewed, the victim was found "lying on his side with the right arm outstretched, the left arm bent at an angle." The entrance wound above the victim's left eyebrow was the source of the blood found in the bedroom. Ms. Sutton further testified that there was evidence of two other

gunshots: one that was fired into the headboard of the bed and another that was fired into the mattress of the bed.

Ms. Sutton opined that the gunshot into the headboard was fired before the fatal gunshot to the victim's forehead. Ms. Sutton explained that strands of the victim's hair were found in the splinters caused by the bullet hole in the headboard, which meant that a bullet was fired into the headboard "and then the hair [came] down into it and [caught on] it." Ms. Sutton testified that once the victim was shot, blood traveled "upward and to the left" striking the wall at a ninety degree angle. Ms. Sutton further testified that blood spatter was found on the headboard and on the wall right above it. Based upon this evidence, Ms. Sutton opined that the victim was "in a raised position" with his head near the top of the headboard when he was shot. Ms. Sutton testified that once shot, the victim's body would have dropped "straight down." Ms. Sutton concluded that the blood spatter was inconsistent with the victim's having been shot in the position his body was found in "or in a low position close to lying down." Ms. Sutton also concluded based upon the evidence she reviewed that the victim's death was a homicide.

No blood was found on the clothes the Defendant gave to Det. Moyers for forensic testing. The three latex gloves found in the victim's bathroom also tested negatively for blood and gunshot residue, a combination of three chemical elements expelled when a gun is fired. However, the Defendant's DNA

was found on the latex gloves. Joe Minor, a supervisor and forensic scientist with the Tennessee Bureau of Investigation (TBI), testified that blood could have been removed from the clothing and the gloves by simply washing the items. Likewise, gunshot residue could have been removed from the gloves by washing them. Gunshot residue was found on the pillow beneath the victim's head and on the back of the victim's left hand. There was "a good distribution of elements on both the palms and the backs of both [of the victim's] hands," but all three elements were only found on the back of the victim's left hand. There was no evidence of gunshot residue on the Defendant's hands. However, Laura Hodges, a forensic scientist with the TBI, testified that gunshot residue can be removed from a person's hands simply by washing them.

Donald Carman, a special agent with the TBI and expert in ballistics, testified that he examined the Colt .38 caliber revolver found beside the victim, three live cartridges found in the revolver, three spent cartridges found in the revolver, a spent bullet recovered from the wall of the bedroom, a bullet fragment recovered from underneath the bed, and a spent bullet recovered from the victim's brain during the autopsy. A spent Western shell casing, two spent Remington shell casings, one live Remington round, and two live Western rounds were recovered from the cylinder of the revolver.

Agent Carman testified that the spent bullets recovered from the wall and the victim's brain were

consistent with the characteristics of a Remington bullet and of having been fired from a Colt .38 caliber revolver. According to Agent Carman, the bullet fragment found underneath the bed was consistent with the characteristics of a Western bullet. Agent Carman testified that the shot fired into the mattress appeared to be a "loose contact" shot where the muzzle was just off the surface of the bed. Based upon the position of the Western shell casing when the cylinder was opened, and the fact that the bullet fragment found under the bed was a Western bullet, Agent Carman opined that the gunshot into the mattress was fired after the gunshots into the headboard and the victim's forehead.

II. Defendant's Evidence

A. Alibi Witnesses

Barbara Sadler testified at trial that in 2003 she worked at Parkwest Hospital as a registered nurse and case manager. On March 13, 2003, Ms. Sadler was working on the "four-west" floor where Mrs. Leath was being treated. Ms. Sadler testified that she normally got to the "four-west" floor around 9:00 a.m. and that shortly after she arrived that morning the Defendant approached her. Ms. Sadler recalled that the Defendant was "teary-eyed" and upset because she did not want Mrs. Leath to be sent to a nursing home that day. Ms. Sadler testified that there was no social worker on the floor at that time, so she told the Defendant she would take care of Mrs. Leath. Ms.

Sadler also recalled that the Defendant told her the victim "was home sick with high blood pressure" that morning. Ms. Sadler testified that she did not notice anything unusual about the Defendant's behavior that morning.

Ms. Sadler testified that on March 19, 2003, she gave a recorded statement to the Defendant and her private investigator. In the statement, Ms. Sadler told the investigator that she could not recall exactly when she saw the Defendant but that it was "sometime between 9:00 and 9:30 a.m." Ms. Sadler testified that she believed she saw the Defendant closer to 9:00 a.m. but admitted that it was "hard to remember exactly" what time it was. Ms. Sadler estimated that it would take someone ten minutes to get from the hospital's parking lot to "four-west." Ms. Sadler recalled that the Defendant was not wearing a face mask when she spoke to her on March 13, 2003. Ms. Sadler also testified that she could not recall seeing the Defendant visit Mrs. Leath prior to that morning.

Sergeant Thomas Fox of the Knoxville Police Department testified that he lived near the Defendant's property and that his wife and the Defendant were friends. Sgt. Fox testified that on the morning of March 13, 2003, he was going to his mailbox to get the newspaper when the Defendant drove up in her car. The Defendant stopped, rolled down her window, and said hello to Sgt. Fox. Sgt. Fox testified that he talked "briefly" with the Defendant that morning. Sgt. Fox characterized his conversation with the Defendant as "[j]ust small talk." Sgt. Fox testified

that the Defendant was "in a good mood" and laughing during their conversation and that she did not seem upset or "teary-eyed." Sgt. Fox further testified that he did not notice anything suspicious about the Defendant's behavior.

Sgt. Fox could not recall which direction the Defendant drove off in. Sgt. Fox also could not recall what time it was when he spoke to the Defendant, but he believed it was sometime "later [in the] morning" around 10:00 or 11:00 a.m. Sgt. Fox testified that, due to his schedule, he did not go to his mailbox at the same time everyday and that his encounter with the Defendant seemed like an "inadvertent passing." Sgt. Fox also testified that the Defendant never stopped to speak with him at his mailbox before or after March 13, 2003. However, Sgt. Fox admitted that the Defendant had visited his wife several times since March 13, 2003.

Ann Troutman testified that on March 13, 2003, she was a guidance counselor at Karns High School (KHS). At that time, the Defendant's daughter Katie attended the school. Ms. Troutman testified that the Defendant and her daughters were very active at the school and that the Defendant was at the school quite often while her daughters were at KHS. According to Ms. Troutman, Katie called the Defendant that day around 10:15 a.m. to ask the Defendant to bring her some stomach medicine. Ms. Troutman testified that the Defendant arrived at the school around 11:00 a.m. and brought drinks for her and Katie. The Defendant stayed in Ms. Troutman's office for approximately

fifteen minutes and "was friendly and pleasant." Ms. Troutman testified that nothing about the Defendant seemed unusual that morning.

Kathy Hobson testified that on March 13, 2003, she was a secretary at KHS. Ms. Hobson recalled the Defendant arriving at the school sometime between 10:30 and 11:00 a.m. The Defendant went to the guidance office and then came to the main office to speak with Ms. Hobson. Ms. Hobson testified that the Defendant "stood there quite a while and talked" to her and another secretary about several things. Ms. Hobson further testified that the Defendant seemed normal and was "happy, jovial" during their conversation.

B. Remaining Witnesses

Betty Lenoir testified that the Defendant and the victim attended the church pastored by her husband. Ms. Lenoir testified that the Defendant and the victim had "a normal relationship" and would regularly attend church together. Ms. Lenoir further testified that their relationship "appeared to be good." Ms. Lenoir recalled that she went to the victim's house on the day of his murder to comfort the Defendant. Ms. Lenoir also recalled that a few weeks after the victim's death, the Defendant spoke to the congregation. However, Ms. Lenoir could not recall what the Defendant said or if she said, "My name is Raynella Dossett, and I'll always be Ms. Dossett."

Raynella Magdelena Connatser testified that she was the Defendant's oldest daughter and had known the victim her entire life. Ms. Connatser testified that the Defendant did not kill the victim because "she loved him" and he "was the best person to her ever." Ms. Connatser told the jury that the victim was her godfather and that he and her father had been friends. Ms. Connatser explained that her father had died in 1992 and that the Defendant and the victim married in January 1993. Ms. Connatser testified that the victim was very loving to her and her siblings, that he had no enemies, and that he was "gentle and loving" to the Defendant. According to Ms. Connatser, the Defendant "loved taking care of" the victim and she could not recall the victim's ever fixing a meal for himself. Ms. Connatser testified that the victim supported her family when her eleven-year-old brother died in a car accident in 1994, and when the Defendant was diagnosed with breast cancer and had both of her breasts removed in February 1999. When Ms. Connatser was married later that year, the victim walked her down the aisle and gave her away.

Ms. Connatser testified that on March 13, 2003, she was a student at the University of Tennessee when she was told that something was wrong at the Defendant's house. Ms. Connatser learned on her way to the Defendant's house that the victim had died. Ms. Connatser testified that when she pulled up to the Defendant's house "it was like a circus." Ms. Connatser recalled that the Defendant was on the front porch "holding a rag" and "kind of shaking."

According to Ms. Connatser, Det. Moyers was talking to the Defendant, and "he was very focused." Ms. Connatser testified that Det. Moyers did not recognize the Defendant's "deteriorating condition." Ms. Connatser recalled that the Defendant "was having to be kind of supported by somebody, and she was shaking, and her eyes were glassed over, almost catatonic, and she was crying." Ms. Connatser testified that "after a number of minutes and [the Defendant] getting worse and worse," she feared that the Defendant was going to die. Ms. Connatser then "removed" the Defendant and took her to a hospital.

Det. Moyers recalled that there was talk that afternoon of sending the Defendant to a hospital because she was so distraught. Ms. Hobson testified that she drove Katie's car from the KHS parking lot to the Defendant's home that afternoon. As she was pulling onto the Defendant's property, Ms. Hobson saw the Defendant being driven away by Ms. Connatser. Ms. Hobson testified that the Defendant looked "close to being in shock," and she was "very upset [and] had been crying." Ms. Hobson also testified that after parking the car, she went into the Defendant's kitchen to leave some homework for Katie and that none of the police officers stopped her or made her sign anything.

Ms. Connatser testified that the Defendant stayed with her for two weeks after the victim's murder. According to Ms. Connatser, the Defendant "was a mess" while staying with her. Ms. Connatser testified that the Defendant "was glassy all the time

. . . and sad and fragile." During that time, Ms. Connatser thought the Defendant "was going [to] die pretty soon." Ms. Connatser testified that most of the victim's things were "just sitting" on the Defendant's property and that the Defendant's house was like "a museum to sadness." According to Ms. Connatser, her father and her brother were buried on the Defendant's property, but Ms. Connatser did not know if the Defendant and the victim intended for the property to remain in the Dossett family or share it with Ms. Wilkerson and her family. Ms. Connatser testified that Mrs. Leath loved the Defendant, but she did not know if the Defendant regularly visited Mrs. Leath in the hospital.

III. Verdict

Based upon the foregoing evidence, the jury convicted the Defendant of first degree premeditated murder. The trial court imposed a sentence of life imprisonment, with the possibility of parole. The Defendant filed a timely motion for new trial and two amended motions for new trial. The trial court denied the Defendant's motion for new trial in a lengthy written order filed January 28, 2011. A few weeks later, the Defendant filed a motion to vacate the trial court's order. Following a hearing, Senior Judge Jon Kerry Blackwood, sitting by designation, denied the motion. The Defendant filed a timely notice of appeal, and this appeal followed.

ANALYSIS

I. Double Jeopardy

The Defendant contends that she was retried in violation of her federal and state constitutional protections against double jeopardy. The Defendant argues that the trial court improperly declared a mistrial in her original trial without following the procedures outlined in Tennessee Rule of Criminal Procedure 31(d)(2) to determine if the jury was unable to reach a verdict on the indicted offense, or if it had acquitted her of the indicted offense and was "hung" on a lesser-included offense. Because of this uncertainty, the Defendant argues that she should not have been retried for the indicted offense. The State responds that the Defendant acquiesced to the trial court's declaration of a mistrial and "cannot now establish a double jeopardy violation."

The Defendant was originally tried between March 2 and 12, 2009. After the jury had deliberated for approximately seven hours, they sent the trial court a note stating that they were "hung" and requesting further instructions from the trial court. When the trial court informed defense counsel of the jury's note, defense counsel stated, "It looks to me like you're at a mistrial." The trial court responded that it was not prepared to declare a mistrial at that time and recalled the jury into the courtroom to inquire if there was a possibility that they could reach a verdict after further deliberations.

The jury foreman stated that there were "philosophical difference[s]" between some jurors as to whether they needed "a smoking gun" in order to convict the Defendant. The jury foreman then stated that the jury was "very lopsided" and that he had been told "by the dissenting party that they [would] never change their mind" and "would not be satisfied unless there were . . . several eyewitnesses to the deed." The trial court asked the jury foreman if there was "room for further negotiation." The foreman told the trial court that the jury needed "a suggestion" as to what they should do. The trial court stated that its "preference" was for the jury to "work a little bit longer." The jury foreman stated that they would, and the jury was sent back to continue its deliberations.

After the jury left the courtroom, the Defendant immediately moved for a mistrial. The Defendant argued that the trial court's colloquy with the jury foreman "unreasonably single[d] out" and pressured the dissenters on the jury. The trial court denied the Defendant's motion. Later, the trial court received a note from the jury stating that they were "closer to a decisive, unanimous verdict" but that they wanted to break for the day. The Defendant renewed her motion for a mistrial, arguing that the jury felt "compelled to render a verdict." The trial court again denied the Defendant's motion but instructed the jury it did not "care if there [was] a verdict in this case" and that it did not want its comments to influence the jury's deliberations. The jury foreman assured the trial court that "[n]o one [had] been coerced in any way."

The next day, the Defendant filed a written motion for a mistrial outlining the same arguments made the previous day and stating that the jury had deliberated "for an unreasonable length of time." The trial court denied the motion for a third time. A few hours later, the trial court received a note from the jury stating that they were unable to reach a verdict. The jury returned to the courtroom, and the trial court addressed the jury, stating that it would declare a mistrial. At that point, defense counsel interrupted the trial court to thank the jury "very much for [their] hard work." The trial court then dismissed the jury. At no point during the proceedings did the trial court inquire as to whether the jury failed to reach a verdict on the indicted offense of first degree premeditated murder or on one of the lesser-included offenses, nor did the jury state which offense they were "hung" on.

At the time, the Defendant made no objection to the trial court's declaration of a mistrial or its dismissal of the jury. Approximately a month later, the Defendant filed a motion to dismiss the indictment against her arguing that the trial court failed to follow Tennessee Rule of Criminal Procedure 31(d)(2) and that retrial would violate her constitutional protections against double jeopardy. The trial court denied the Defendant's motion and her application for an interlocutory appeal. This court denied the Defendant's motion for an extraordinary appeal. The Defendant now raises this issue on direct appeal.

Both the federal and state constitutions protect a defendant from being "twice put in jeopardy of life or

limb" for "the same offense." U.S. CONST. amend. V; TENN. CONST. art. 1, § 10. Our state constitutional provision has been interpreted identically to the federal constitution's prohibition against double jeopardy. *State v. Houston,* 328 S.W.3d 867, 875 (Tenn. Crim. App. 2010). The constitutional prohibition against double jeopardy also encompasses a defendant's "right to have [her] trial completed before a particular tribunal." *Id.* at 878 (quoting *State v. Nash,* 294 S.W.3d 541, 550 (Tenn. 2009)) (internal quotation marks omitted).

However, the prohibition against double jeopardy does not bar retrial when "there is a 'manifest necessity' for the declaration of [a] mistrial, regardless of the defendant's consent or objection." *State v. Mounce,* 859 S.W.2d 319, 321 (Tenn. 1993). "The impossibility of a jury reaching a verdict has long been recognized as a sufficient reason for declaring a mistrial." *Id.* at 321-22. But it is only a sufficient reason "when there is no feasible and just alternative to halting the proceedings that a manifest necessity is shown." *Id.* at 322. When a trial court improperly exercises its discretion and discharges a jury without a finding of manifest necessity, such a discharge is "tantamount to an acquittal." *Houston,* 328 S.W.3d at 880.

In this state, "sequential jury instructions" are given to the jury which "require a jury to consider [guilt] of the greatest charged offense before moving on to consider the lesser-[included] offenses." Tenn. R. Crim. P. 31, Advisory Comm'n Cmt. Due to the use of sequential jury instructions, when a jury "reports an

inability to reach a verdict, it is not always apparent on which offense the jury disagreed." *Id.* "If the [trial] court grants a mistrial as to all offenses because of the jury's failure to reach agreement on a lesser[-included] offense, the double jeopardy clause is implicated if the jury actually acquitted the defendant of one or more of the greater offenses but disagreed on a lesser one." *Id.*

To prevent such a situation for [sic] occurring, Tennessee Rule of Criminal Procedure 31(d)(2) provides as follows:

> If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed.

Rule 31(d)(2) then outlines a detailed procedure for trial courts to utilize in order to determine which offense a jury has deadlocked on.

Here, the trial court properly determined that the jury was hopelessly deadlocked and that a manifest necessity for a mistrial existed. However, there was no indication from the jury as to which charge they were deadlocked on, and the trial court failed to inquire whether the disagreement involved the indicted offense of first degree premeditated murder or one of the lesser-included offenses. As such, the trial court erred when it declared a mistrial and dismissed

the jury without first engaging in the procedure outlined in Rule 31(d)(2). Nevertheless, the trial court's failure to follow Rule 31(d)(2) in this case did not bar the Defendant's retrial.

The prohibition against double jeopardy does not bar retrial "if the defendant consented to the termination of the proceeding at issue." *Mounce,* 859 S.W.2d at 321; *see also State v. Huskey,* 66 S.W.3d 905, 916 (Tenn. Crim. App. 2001) (stating that "double jeopardy does not bar a retrial when the defendant asks for a mistrial"). In such situations the defendant "has deliberately elected to forego [her] right to have guilt or innocence determined by the first trier of fact." *Id.* (quoting *State v. Knight,* 616 S.W.2d 593, 596 (Tenn. 1981)). Our supreme court has held that "when a defendant chooses not to object to the mistrial and give the trial court an opportunity to correct the error, consent may be inferred and, therefore, double jeopardy will not bar a subsequent prosecution." *Id.* at 323. However, before consent can be inferred from the defendant's silence, the "defendant must have a realistic opportunity to object, prior to a trial court's sua sponte declaration of a mistrial." *Houston,* 328 S.W.3d at 881 (quoting *State v. Skelton,* 77 S.W.3d 791, 800 (Tenn. Crim. App. 2001)).

The Defendant requested a mistrial three times, twice orally and once in a written motion, before the trial court ultimately declared a mistrial and dismissed the jury. It is clear from the record that the Defendant "deliberately elected to forego [her] right to have guilt or innocence determined by the first

trier of fact." *Mounce,* 859 S.W.2d at 321. As such, the Defendant cannot now claim that the trial court lacked the manifest necessity required for the declaration of a mistrial. Nor can the Defendant claim that the prohibition against double jeopardy barred her retrial because the trial court failed to follow the procedures outlined in Rule 31(d)(2). The Defendant acquiesced in the trial court's failure to follow Rule 31(d)(2) by failing to object to the error.

The Defendant cites *State v. Houston,* 328 S.W.3d at 867, for the proposition that she did not acquiesce in the trial court's error because she did not have a meaningful opportunity to object. However, the facts in *Houston* are markedly different from the facts of this case. In *Houston,* the jury was dismissed without an actual declaration of a mistrial. *Id.* at 881 (stating that "where there has been no actual declaration of a mistrial, the defendant will not be held responsible for [her] failure to object to the termination of the proceedings"). Here, the possibility of a mistrial was discussed over a two-day period, during which the Defendant requested a mistrial on three separate occasions.

Furthermore, prior to declaring the mistrial and dismissing the jury, the trial court made lengthy remarks which defense counsel interrupted in order to thank the jury for its service. The Defendant had ample opportunity to object to the trial court's failure to follow Rule 31(d)(2) prior to the jury's dismissal but failed to do so. Accordingly we conclude that the Defendant consented to the declaration of a mistrial

and acquiesced in the trial court's failure to follow Rule 31(d)(2). Therefore, the Defendant's retrial was not barred by the constitutional protections against double jeopardy.

II. Admissibility of Test Results from Samples of the Victim's Blood and Urine

The Defendant contends that the trial court erred by denying her pre-trial motion to exclude test results from analysis of the victim's blood and urine. The Defendant argues that the State had a duty to preserve samples of the victim's blood and urine and that destruction of the samples warranted exclusion of the test results from the TBI's analysis of the samples pursuant to *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999). The Defendant further argues that the State was "grossly negligent" in the destruction of the samples and that the test results "formed an integral and important aspect" of the State's case against her. The State responds that exclusion of the test results was not warranted in this case because the samples were destroyed pursuant to TBI policy, and no evidence was presented to challenge "the accuracy of the results reached by the TBI . . . or the testing methods used."

During the victim's autopsy on March 14, 2003, samples of his blood and urine were taken to be tested for the presence of alcohol and narcotics. The samples were sent to the TBI, and the victim's blood tested positive for Demerol, Sinequan, and Phenergan.

Jeff Crews, a special agent with the TBI and expert in toxicology, testified at trial that it was standard procedure to destroy blood and urine samples sixty days "after [the TBI] report goes out." Special Agent Crews testified that the samples in this case were destroyed on February 2, 2004. Special Agent Crews further testified that his report was sent to the medical examiner and the District Attorney General's office but that no notice was sent to the Defendant that the samples were to be destroyed. Special Agent Crews testified at trial that the narcotics found in the samples would normally degrade over time; therefore, it would be unlikely that tests on the samples several years later would have been accurate even if the samples had been preserved.

At the time the samples were destroyed, the Defendant had not been indicted for the victim's murder. After the Defendant was indicted in November 2006, she filed a motion to preserve all samples of the victim's blood. After learning that the samples had been destroyed, the Defendant filed a motion to exclude the test results from the TBI's analysis of the samples. The trial court concluded that the State had a duty to preserve the samples but that the test results would not be excluded because the samples had been destroyed pursuant to TBI policy, the evidence was not necessary to establish an element of the indicted offense, and the Defendant had not "challenged the sufficiency or accuracy of the TBI testing or procedures."

In order to ensure a defendant's constitutional right to a fair trial, the State must provide the defendant with exculpatory evidence that is either material to guilt or relevant to punishment. *Ferguson,* 2 S.W.3d at 915. In situations where evidence that the defendant maintains would have been exculpatory has been lost or destroyed by the State, trial courts must determine whether a trial, conducted without the missing evidence, would be fundamentally fair. *Id.* at 914. The first step in this analysis "is to determine whether the State had a duty to preserve the evidence." *Id.* at 917.

Only if the proof establishes the existence of such a duty and that the State failed in that duty, will a trial court then conduct a balancing analysis involving the following factors: "1.) The degree of negligence involved; 2.) The significance of the destroyed evidence; considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3.) The sufficiency of the other evidence used at trial to support the conviction." *Ferguson,* 2 S.W.3d at 917 (footnote omitted). After considering all of these factors, if the trial court concludes "that a trial without the missing evidence would not be fundamentally fair," it may dismiss the charges or "craft such orders as may be appropriate to protect the defendant's fair trial rights." *Id.*

We disagree with the trial court's conclusion that the State had a duty to preserve the victim's blood and urine samples. Generally, "the State has a duty to preserve all evidence subject to discovery and

inspection under [Tennessee Rule of Criminal Procedure] 16, or other applicable law." *Ferguson,* 2 S.W.3d at 917. However, this duty is limited to constitutionally material evidence which "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (quoting *California v. Trombetta,* 467 U.S. 479, 488-89 (1984)).

Furthermore, the duty to preserve evidence "does not extend to that which the State cannot preserve," such as evidence that is consumed during testing or is too dangerous to retain. *State v. Tony Best,* No. E2007-00296-CCA-R3-CD, 2008 WL 4367259, at *14 (Tenn. Crim. App. Sept. 25, 2008), *perm. app. denied,* (Tenn. Mar. 16, 2009). "It is common knowledge that human blood is perishable, and specimens of blood can only be maintained for a short period of time." *State v. David Lynn Jordan,* No. W2007-01272-CCA-R3-DD, 2009 WL 1607902, at *35 (Tenn. Crim. App. June 9, 2009), *aff'd,* 325 S.W.3d 1 (Tenn. 2010).

The samples of the victim's blood and urine were taken at his autopsy in March 2003. The Defendant did not request that the samples be preserved and provided to her for independent testing until after she was indicted in November 2006. Special Agent Crews testified at trial that the narcotics found in the samples would normally degrade over time, making it unlikely that tests conducted on the samples several years later would have produced accurate results. As such, the State had no duty to preserve the samples

in this case. Moreover, even if the State had a duty to preserve the samples, the Defendant "has failed to demonstrate that [her] right to a fair trial was affected by the destruction of the evidence." *Jordan,* 2009 WL 1607902, at *35.

The State did not act in bad faith in destroying the samples, as they were destroyed in accordance with established TBI policy and long before the Defendant was indicted in this case. *Jordan,* 2009 WL 1607902, at *35 (stating that the "mere loss or destruction of evidence does not constitute bad faith"). There was no evidence that the samples were improperly collected or tampered with, and the chain of custody was established at trial. More importantly, the Defendant has not presented any evidence to question or doubt the accuracy of the TBI's analysis of the samples. As such, "it cannot be said that evidence critical to the defense was excluded." *Id.* Accordingly, we affirm the trial court's denial of the Defendant's motion to exclude the test results.

III. Admissibility of "Estate Planning" Documents

The Defendant contends that the trial court erred by denying her pre-trial motion to exclude evidence regarding her and the victim's "estate planning, wills, [and] quitclaim deeds." The Defendant argues that this evidence was irrelevant and that its probative value was substantially outweighed by the danger of unfair prejudice. The Defendant's chief argument is that this evidence could not be used to establish

motive because the "quitclaim deeds . . . accomplished in life what their wills would have accomplished in death." The State responds that the trial court did not abuse its discretion in admitting this evidence because it was relevant to establish the Defendant's motive and was not unfairly prejudicial.

A determination regarding the relevancy of evidence "is a matter within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Biggs,* 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006) (citing *State v. DuBose,* 953 S.W.2d 649, 652 (Tenn. 1997)). Tennessee Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, relevant evidence is admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. However, relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice. . . ." Tenn. R. Evid. 403.

The "estate planning documents" introduced at trial established that the Defendant would inherit the victim's entire estate, to the exclusion of his daughter, upon his death. The quitclaim deeds established that the Defendant would become the sole owner of the victim's real property upon his death. The documents also established that the victim would have inherited all of the Defendant's estate, to the exclusion of her children, had she died before him. The Defendant and

the victim owned a large amount of real property which the Defendant stood to gain sole ownership of upon the victim's death. This evidence had the tendency to make the existence of the fact that the Defendant had a financial motive to kill the victim more probable than it would be without the evidence.

This evidence had significant probative value because it established a possible financial motive for the Defendant. There is nothing in the record before us to suggest that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. The Defendant's argument that the "quitclaim deeds . . . accomplished in life what their wills would have accomplished in death" is an attack on the weight and credibility of the evidence, which was for the jury to determine, and has nothing to do with the evidence's admissibility. *See* NEIL P. COHEN, SARAH Y. SHEPPEARD, & DONALD F. PAINE, TENNESSEE LAW OF EVIDENCE § 4.01[5][e] (6th ed. 2011) (stating that the trier of fact determines the weight to be given to a piece of evidence and in doing so the trier of fact "decides how convincing the evidence is in the context of the case"). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the "estate planning" documents into evidence.

IV. 404(b) Evidence

The Defendant contends that the trial court erred in denying her motion for a mistrial after a witness testified that she had previously stated that she was

"scared" of the Defendant. The Defendant argues that the witness' statement was improper evidence of a prior bad act elicited in violation of Tennessee Rule of Evidence 404(b) and instilled "in the minds of the jury that [the Defendant] was a bad person to be feared." The State responds that the trial court did not abuse its discretion in denying the Defendant's motion for a mistrial because the witness' testimony that she was "scared" of the Defendant was "not clear and convincing evidence of a prior bad act."

Barbara Sadler was called as a defense witness during the trial and testified that she was a case manager and registered nurse at Parkwest Hospital. Ms. Sadler also testified that "for a couple of years" she worked "under [the Defendant's] leadership" when the Defendant was director of nursing at the hospital. On cross-examination, the prosecutor asked Ms. Sadler if she recalled telling Det. Moyers "that [she] was scared of" the Defendant. Ms. Sadler responded that she recalled "saying that and scared – yes, [she] did say that." Defense counsel objected and moved for a mistrial, stating that Ms. Sadler's testimony was "clearly 404(b)." The trial court denied the Defendant's motion, stating that it did not believe that "somebody being scared of somebody is 404(b)." The State did not ask anymore [sic] questions of Ms. Sadler. On redirect examination, Ms. Sadler testified that the Defendant had never "done anything" to her and that she had never had any altercations with the Defendant.

The determination of whether to grant a mistrial lies within the sound discretion of the trial court and, as we alluded to above, should be granted "only in the event of a 'manifest necessity' that requires such action." *State v. Hall,* 976 S.W.2d 121, 147 (Tenn. 1998) (appendix). The burden of establishing a "manifest necessity" lies with the party seeking the mistrial. *State v. Williams,* 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). When determining whether a "manifest necessity" exists, "no abstract formula should be mechanically applied and all circumstances should be taken into account." *Mounce,* 859 S.W.2d at 322. "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." *Williams,* 929 S.W.2d at 388. A trial court's decision regarding whether to grant a mistrial will only be overturned upon a showing of an abuse of discretion. *Id.*

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that person's actions were in conformity with the character trait. Tenn. R. Evid. 404(b). However, we agree with the State that Ms. Sadler's testimony that she had previously stated that she was "scared" of the Defendant was not evidence of a prior bad act. Ms. Sadler did not testify as to any prior acts committed by the Defendant, and her testimony, even at its most damaging, only created a mere inference of some possible, undefined prior bad act. *See United States v. Harris,* 165 F.3d 1062, 1066 (6th Cir. 1999)

(arriving at a similar conclusion under Federal Rule of Evidence 404(b)); *Haak v. State,* 695 N.E.2d 944, 947 (Ind. 1998) (arriving at a similar conclusion under Indiana Rule of Evidence 404(b)). The State did not inquire any further about Ms. Sadler's statement after the Defendant's objection, and on redirect examination, Ms. Sadler testified that the Defendant had never "done anything" to her or had any altercations with her. Based upon the totality of the circumstances, we conclude that the trial court did not abuse its discretion when it denied the Defendant's motion for a mistrial following Ms. Sadler's testimony.

V. Sufficiency of the Evidence

The Defendant contends that the evidence was insufficient to sustain her conviction for first degree premeditated murder. The Defendant argues that her conviction was based "entirely on speculation" and that the State failed to establish her identity as the perpetrator of the offense. The Defendant chiefly complains that the evidence produced at trial established that she left the victim's house "shortly after 8:30 [a.m.]," leaving a period of time too small for her to have killed the victim. While acknowledging that our supreme court has altered the standard by which the sufficiency of circumstantial evidence is judged in *State v. Dorantes,* 331 S.W.3d 370 (Tenn. 2011), the Defendant nevertheless urges this court to apply the pre-*Dorantes* standard and argues that the State's evidence was not "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of

the defendant." The State responds that the evidence, while circumstantial, was sufficient to sustain the Defendant's conviction.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). This court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. *See State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn. 1984); *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. *See State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997).

A guilty verdict "removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." *Bland,* 958 S.W.2d at 659; *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982). A guilty verdict "may not be based solely upon conjecture, guess, speculation, or a mere possibility." *State v. Cooper,* 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). However, "[t]here is no requirement that the State's proof be uncontroverted or perfect." *State v. Williams,*

657 S.W.2d 405, 410 (Tenn. 1983). Put another way, the State is not burdened with "an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 326.

The following standard "applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of [both] direct and circumstantial evidence." *State v. Pendergrass,* 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Our supreme court has held that circumstantial evidence is as probative as direct evidence. *Dorantes,* 331 S.W.3d at 379-81. In doing so, the supreme court rejected the previous standard which "required the State to prove facts and circumstances so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *Id.* at 380 (quoting *Crawford,* 470 S.W.2d at 612) (quotation marks omitted).

Instead, "direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence." *Dorantes,* 331 S.W.3d at 381. The reason for this is because with both direct and circumstantial evidence, "a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference . . . [and] [i]f the jury is convinced beyond a reasonable doubt, we can require no more." *Id.* at 380 (quoting *Holland v. United States,* 348 U.S. 121, 140 (1954)). To that end, the duty of this court "on appeal of a conviction is not to contemplate all plausible inferences in the [d]efendant's favor, but to draw all

reasonable inferences from the evidence in favor of the State." *State v. Sisk,* 343 S.W.3d 60, 67 (Tenn. 2011).

Premeditated first degree murder is defined as "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a).

> Premeditation is an act done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.

Tenn. Code Ann. § 39-13-202(d) (internal quotations omitted).

The element of premeditation only requires the defendant to think "about a proposed killing before engaging in the homicidal conduct." *State v. Brown,* 836 S.W.2d 530, 541 (Tenn. 1992). The presence of premeditation is a question for the jury and may be established by proof of the circumstances surrounding the killing. *Bland,* 958 S.W.2d at 660. Our supreme court has held that factors demonstrating the existence of premeditation include, but are not limited to, the following: the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill,

evidence of procurement of a weapon, preparations before the killing for concealment of the crime, destruction or secretion of evidence of the killing, and calmness immediately after the killing. *See State v. Davidson,* 121 S.W.3d 600, 614 (Tenn. 2003); *Bland,* 958 S.W.2d at 660. Additional factors cited by this court from which a jury may infer premeditation include lack of provocation by the victim and the defendant's failure to render aid to the victim. *See State v. Lewis,* 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000).

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the evidence at trial was sufficient to establish that the victim's death was a homicide. The victim was shot above his left eye from a distance of approximately twelve inches away. The victim was blind in his left eye, and Dr. Mileusnic-Polchan testified that it was "extremely rare" in suicides to find a non-contact forehead wound. The victim was also heavily sedated at the time of his death. The forensic evidence established that a gunshot was fired into the headboard of the bed, the victim raised his head to near the top of the headboard, was fatally shot, and his body fell straight down onto the bed. The victim's body was then moved and wrapped in bed sheets. The position of the victim's body did not match the blood splatter in the room. A third gunshot, which would have been impossible for the victim to fire after he had been shot, was fired into the bed after the victim's body had been moved.

With respect to the Defendant's identity as the perpetrator of the offense, we begin by noting that the Defendant was the last person to see the victim alive and made the 911 call reporting the victim's death. That morning, the Defendant had made conflicting statements about where the victim was. The Defendant told Ms. Sadler that the victim "was home sick with high blood pressure," but she told Ms. Wilkerson that she expected the victim "to go work out" and possibly visit Ms. Wilkerson at work. The Defendant then repeatedly stated that the victim had killed himself. The Defendant told Det. Moyers that the victim "had some medical problems" and was depressed. The Defendant volunteered a calender [sic] to Det. Moyers in which she purported to document the victim's declining mental health. However, Dr. Mileusnic-Polchan testified that the victim was in good health and did not suffer from Alzheimer's disease. The Defendant had prepaid for the victim's cremation without the victim present, and the victim's body was cremated the day after the autopsy in accordance with that contract.

There was no evidence that the home had been broken into or that a struggle had occurred in the victim's bedroom. The victim had been sedated, possibly by having the drugs placed into his food. There was testimony at trial that the Defendant prepared all of the vicitm's [sic] meals. The murder weapon was identified as having belonged to the victim's father. The gun had been kept at Mrs. Leath's residence, which the Defendant had a key to, and an empty

holster fitting the murder weapon was found there several weeks after the victim's death. The Defendant eventually told Det. Moyers that she believed the gun belonged to the victim's father. Witnesses testified that the victim did not like "handguns" and would not have shot himself in the face. Latex gloves which tested positive for the presence of the Defendant's DNA were found in the bathroom next to the bedroom where the victim's body was found.

The calender [sic] given to Det. Moyers by the Defendant had several entries that described the victim as "hateful" and "controlling." It also documented several fights between the Defendant and the victim in the months leading up to March 13, 2003. A few days before the murder, the Defendant told Ms. Wilkerson that "she was going to teach [the victim] a F'ing [sic] thing." Also, a month before the murder, the victim visited his attorney, Mr. Child, and was "agitated, emotional," and "upset" about his will. The victim spoke with Mr. Child alone about his will, but he made no changes. The victim's will gave his entire estate to the Defendant. Additionally, quitclaim deeds ensured that upon the victim's death, the Defendant would become the sole owner of all their real property.

Witnesses testified that the Defendant's actions on the morning of March 13, 2003, were unusual and out of character for her. The Defendant called Ms. Wilkerson that morning while Ms. Wilkerson was at work. Ms. Wilkerson testified that the Defendant had been "distant" towards her and "never called [her] at

work." The Defendant told Ms. Wilkerson that she had gone to the hospital to take Mrs. Leath some flowers and told her that the victim "didn't eat his oatmeal" that morning. Ms. Wilkerson testified that the Defendant's voice "didn't sound right" and that she seemed too "chipper." The Defendant rarely visited Mrs. Leath in the hospital. The Defendant normally wore a face mask whenever she went to a hospital due to a liver condition, but on March 13, 2003, she visited Mrs. Leath in the hospital without a mask over her face. The Defendant also stopped to speak with her neighbor, Sgt. Fox, at his mailbox that morning. Sgt. Fox testified that the Defendant had never stopped to talk to him in his driveway before or after March 13, 2003.

A few weeks after the victim's death, the Defendant along with a private investigator went to Parkwest Hospital to interview several hospital employees. As one interview was concluding, the Defendant "gave the impression that something had just popped into her mind" and recalled that she had spoken to a physical therapist on March 13, 2003, and made a phone call to the victim in front of her. Ms. Wilkerson testified that the Defendant only visited Mrs. Leath in the hospital one time after the victim's death and that was to return Mrs. Leath's pocketbook and house keys. The Defendant eventually told Ms. Wilkerson that Mrs. Leath was "no more than a neighbor to her" and was Ms. Wilkerson's "responsibility" as the "next of kin."

The Defendant argues that she could not have killed the victim because there was too small a window of time for her to have committed the offense. The Defendant states in her brief that her daughter Katie left for school sometime between 8:00 and 8:15 a.m. that morning. However, there is no evidence in the record to establish what time Katie left for school. The record does establish that Katie was at school that morning. Additionally, the Defendant told Ms. Wilkerson that she had been in the house with victim and that he did not eat his breakfast. The Defendant argues that she must have left the house "shortly after 8:30 [a.m.]" in order to have stopped to get flowers, speak with Sgt. Fox, and arrive at Parkwest by 9:00 a.m. While this is a plausible inference that can be drawn from the evidence presented at trial, it is not the only plausible inference that may be established by the evidence.

Ms. Sadler testified that she could not remember exactly when she spoke to the Defendant on the "four-west" floor of Parkwest Hospital on March 13, 2003 but that she believed it was closer to 9:00 a.m. However, Ms. Sadler gave a recorded statement to the Defendant's private investigator that she saw the Defendant "sometime between 9:00 and 9:30 a.m." There was a notation in Mrs. Leath's medical records at 9:53 a.m. that morning that the Defendant had spoken to a physical therapist. Likewise, Sgt. Fox testified that he believed he spoke to the Defendant sometime between 10:00 and 11:00 a.m. that morning and that he could not recall which direction she drove

off in. Dr. Mileusnic-Polchan opined that the victim had been killed between "one or two hours to six hours" before the investigators arrived at the house shortly after 11:30 a.m.

The State was not required to rule out every hypothesis except that of the Defendant's guilt beyond a reasonable doubt. The Defendant's argument here would have this court accept all plausible inferences in her favor while ignoring the plausible inferences arising from the evidence that favor the State. Based upon the foregoing evidence, it was possible that the Defendant did not arrive at Parkwest Hospital on March 13, 2003, until 9:30 a.m. or later. The fact that the jury chose not to believe the Defendant's alibi does not cause its verdict to be suspect. *See Williams,* 657 S.W.2d at 410-11 (concluding that jury's decision not to believe alibi witnesses was within its province). As recognized by the *Dorantes* standard, the jury was in a better position than this court to weigh the evidence and decide between the competing plausible theories presented by the State and the Defendant.

The mere fact that the jury chose the State's plausible theory over that of the Defendant's does not justify overturning the jury's verdict. So long as the jury's verdict was supported by reasonable inferences drawn from the evidence, we are bound to uphold it against a challenge to the sufficiency of the evidence. *See Sisk,* 343 S.W.3d at 67; *cf. State v. Chad Allen Love,* No. E2010-01782-CCA-R3-CD, 2012 WL 391064, at *6-8 (Tenn. Crim. App. Feb. 8, 2012) (concluding

that the defendant's identity as the alleged perpetrator of the crime could not be reasonably inferred from the evidence established at trial). Based upon the foregoing evidence, we conclude that a rational juror could reasonably infer the Defendant's identity as the perpetrator of the offense from the evidence presented at trial.

We also conclude that the evidence was sufficient to establish the elements of premeditation and intent. A shot was fired into the headboard of the victim's bed before the victim was shot in the forehead. The bullet severed the victim's brain stem, killing him instantly. The victim was unarmed, heavily sedated, and unable to defend himself. The gun used had belonged to the victim's father and had been taken from Mrs. Leath's home sometime before the murder. The victim's body was moved, a pillow was placed beneath his head, and sheets were tucked in around his body in an effort to make his death appear to be a suicide. The Defendant went to visit Mrs. Leath and called Ms. Wilkerson that morning, both actions that were unusual for her. Ms. Wilkerson recalled that the Defendant seemed too "chipper" and several witnesses testified that the Defendant seemed normal, friendly, and happy that morning. Having determined that the State established all the requisite elements of first degree premeditated murder, we conclude that the evidence was sufficient to sustain the Defendant's conviction.

VI. Jury Instructions

A. Ferguson Instruction

The Defendant contends that the trial court erred by failing to instruct the jury on the State's duty to preserve evidence pursuant to *State v. Ferguson,* 2 S.W.3d at 917 n.11. The Defendant argues that the *Ferguson* instruction should have been provided to the jury because the State destroyed samples of the victim's blood and urine prior to her being indicted for the victim's murder. The State responds that such an instruction was not warranted under the facts of this case. We have previously concluded that the State had no duty to preserve the samples taken from the victim, and, even if it did, the Defendant's right to a fair trial was not affected by the destruction of the samples. As such, we conclude that the trial court did not err in denying the Defendant's request for a *Ferguson* jury instruction.

B. Alibi Instruction

The Defendant contends that the trial court's jury instruction regarding the defense of alibi improperly shifted the burden of proof. The Defendant argues that the use of the words "if believed" in the pattern jury instruction used by the trial court "improperly shifted the burden of proof" and suggested that she "had some affirmative duty to prove her alibi." The State responds that the instruction did not shift the burden of proof onto the Defendant because it explicitly stated that the burden was on the State

"to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed."

A defendant is entitled to "a correct and complete charge of the law governing the issues raised by the evidence presented at trial." *State v. Brooks,* 277 S.W.3d 407, 412 (Tenn. Crim. App. 2008) (citing *State v. Forbes,* 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995)). In determining whether a jury instruction correctly, fully, and fairly sets forth the applicable law, we review the instruction in its entirety. *Id.* (citing *State v. Guy,* 165 S.W.3d 651, 659 (Tenn. Crim. App. 2004)). "Phrases may not be examined in isolation." *Id.* (citing *State v. Dellinger,* 79 S.W.3d 458, 502 (Tenn. 2002)).

In *Christian v. State,* our supreme court approved the following jury instruction for use when the facts of a case raise the defense of alibi:

> An alibi is defined as evidence which *if believed* would establish that the defendant was not present at the scene of the alleged crime when it allegedly occurred. If the defendant was not present when the crime was committed, [she] cannot be guilty.
>
> *The burden is on the state to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed.* If you find from your consideration of all the evidence that *the state has failed to prove beyond a reasonable doubt* that the defendant was at the scene of the

> crime when it was committed, *you must find the defendant not guilty.*

555 S.W.2d 863, 866 (Tenn. 1977) (emphasis added); *see also* T.P.I. Crim. 42.13.

Read in its entirety, it is clear that the alibi instruction used here did not improperly shift the burden of proof onto the Defendant. While the words "if believed" are used in the first part of the instruction, the second part makes clear that the burden of proof is on the State to prove beyond a reasonable doubt that the defendant was present at the commission of the offense. The second part of the instruction further elaborates that if the State fails to met [sic] its burden, then the jury should acquit the defendant.

The Defendant argues that her contention that the words "if believed" in the alibi instruction improperly shifted the burden of proof is supported by the fact that an "'if believed' jury instruction like Tennessee's was held to impermissibly shift the burden of proof" by the New York Court of Appeals. However, the jury instruction at issue in the case cited by the Defendant was not invalidated solely because it used the term "if believed." Instead, it was found to improperly shift the burden onto the defendant because it failed to state that the prosecution "had the burden of disproving the alibi beyond a reasonable doubt" in addition to using the words "if believed." *People v. Hoke,* 468 N.E.2d 677, 680 (N.Y. 1984); *cf. Fox v. Mann,* 71 F.3d 66, 71-72 (2nd Cir. 1995) (concluding that an alibi instruction which stated that the jury

was to determine if alibi witnesses had testified truthfully did not shift the burden of proof where the instruction also emphasized that the prosecution had the burden of proof); *Richard Murphy v. Kathleen Dennehy,* No. 05-12246-DPW, 2007 WL 430754, at *12 (D. Mass. Feb. 5, 2007) (concluding that alibi instruction which stated "if you believe the defendant's alibi" did not shift the burden of proof because it also "made clear" that the prosecution "bore the burden on each essential element of the offense"). Accordingly, we conclude that trial court did not err in its use of the *Christian* alibi instruction.[5]

C. "Theory of Defense" Instruction

The Defendant contends that the trial court erred by failing to instruct the jury on her "theory of defense." Prior to the trial court's instructing the jury, the Defendant orally moved the trial court to charge "the defense theory to the effect that the defense theory of the case [was] that the State [had] not proven the presence of the Defendant at the time of the offense, and that the Defendant did not kill the

[5] The Defendant also contends that the trial court's use of the *Christian* instruction constituted an improper comment on the evidence by the trial court. *See State v. Suttles*, 767 S.W.2d 403 (Tenn. 1989). However, there is nothing in the record to suggest that the trial court made any comment on the Defendant's alibi defense other than to read the pattern jury instruction approved by our supreme court in *Christian.* As such, we conclude that this issue is devoid of any merit.

deceased." The State responds that the Defendant has waived this issue by failing to file a written request for the jury instruction. The State further responds that the trial court fully and fairly instructed the jury on the applicable law, including instructing the jury on the defense of alibi.

We agree with the State that the Defendant has waived full appellate review of this issue. The Defendant failed to file a written request for a special jury instruction on her "theory of defense." *See* Tenn. R.Crim. P. 30(a); *State v. Mackey,* 638 S.W.2d 830, 836 (Tenn. Crim. App. 1982) (stating that Rule 30 "envisions that such requests be made in writing" and that oral requests for instructions are not sufficient for an appellate court to place a trial court in error for rejecting a requested jury instruction). Additionally, the Defendant failed to include this issue in her motion for new trial. *See* Tenn. R. App. P. 3(e) (stating that "no issue presented for review shall be predicated upon error in . . . jury instructions granted or refused, . . . unless the same was specifically stated in a motion for new trial"). Due to the Defendant's waiver of this issue, we examine the issue solely to determine whether plain error review is appropriate.

The doctrine of plain error only applies when all five of the following factors have been established:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused must not have waived the issue for tactical reasons; and

(e) consideration of the error must be "necessary to do substantial justice."

State v. Page, 184 S.W.3d 223, 230-31 (Tenn. 2006) (quoting *State v. Terry,* 118 S.W.3d 355, 360 (Tenn. 2003)) (internal brackets omitted). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *Id.* at 231.

Plain error review is not appropriate here because the Defendant has failed to establish that consideration of the error is necessary to do substantial justice. The requested "theory of defense" jury instruction was nothing more than a restatement of the Defendant's alibi defense. As discussed above, the trial court gave an alibi instruction that correctly, fully, and fairly set forth the applicable law. Likewise, the trial court fully and fairly instructed the jury on Defendant's presumption of innocence and the State's burden of proof. Accordingly, we conclude that plain error review is not warranted and that this issue is without merit.

VII. Alternate Juror Selection

The Defendant contends that the trial court used an improper method to select the alternate juror. The

Defendant argues that a "plain and simple reading" of Tennessee Rule of Criminal Procedure 24(f)(2)(A) mandates that trial courts randomly select twelve names "to serve as the jurors to deliberate and the juror[s] not selected . . . shall be discharged." According to the Defendant, Rule 24(f)(2)(A) "does not say to pick one [juror] and send him or her home. It says to pick twelve and send the rest home." The State responds that the Defendant has waived this issue by failing to raise a contemporaneous objection to the trial court's method of selection and by failing to include this issue in her motion for new trial. The State further responds that the text of Rule 24(f)(2)(A) clearly belies the Defendant's argument.

After the close of the Defendant's proof, during a scheduling discussion regarding when the jury would begin its deliberations, defense counsel incorrectly stated to the trial court that Rule 24(f)(2)(A) required that the trial court "select by lot the names of the requisite number of jurors to – to a body of twelve," meaning that the trial court would "pick twelve names out of the box, and whoever is left on the cutting room floor [would be] the alternate." The trial court responded that it had never selected alternate jurors in such a manner and that defense counsel had misinterpreted the rule. The trial court then read Rule 24(f)(2)(A) in its entirety to defense counsel and informed defense counsel that it would randomly select the name of the alternate juror. Defense counsel repeatedly stated that he was not "challenging" or "arguing" with the trial court's method of selecting

the alternate juror. Instead, defense counsel stated that he was "just pointing [ ] out what the rule says." After instructing the jury, the trial court selected the alternate juror by randomly selecting his name from a bowl. The Defendant made no objection to the trial court's selection.

We agree with the State that the Defendant has waived full appellate review of this issue. The Defendant failed to raise a contemporaneous objection during the trial court's selection of the alternate juror. *See* Tenn. R. App. P. 36(a) (stating that "[n]othing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). Likewise, the Defendant failed to raise this issue in her motion for new trial. *See* Tenn. R. App. P. 3(e) (stating that "no issue presented for review shall be predicated upon . . . [a] ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial"). As such, we will only examine this issue to determine whether plain error review is appropriate.

Tennessee Rule of Criminal Procedure 24(f)(2) allows trial courts to choose between two methods to select and impanel alternate jurors. Here the trial court chose the single entity method, which is governed by Rule 24(f)(2)(A):

> During jury selection and trial of the case, the court shall make no distinction as to

> which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number *to reduce the jury to a body of twelve* or such other numbers as the law provides. A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.

(Emphasis added). The Advisory Commission Comment to Rule 24(f)(2)(A) further clarifies that "before the jury retires to deliberate the court will *randomly deselect the additional jurors,* leaving the desired number of jurors, ordinarily twelve. The *deselected jurors* are then discharged when the remaining jurors retire to deliberate." (Emphasis added).

The Defendant's argument runs counter to both the plain text of Rule 24(f)(2)(A) and the spirit of the rule, as expressed in the Advisory Commission Comment. Plain error review of this issue is not appropriate here because the Defendant has failed to establish that "a clear and unequivocal rule of law" has been breached. *Page,* 184 S.W.3d at 230. Accordingly, we conclude that this issue lacks any merit.

VIII. Juror Misconduct

The Defendant contends that members of the jury committed misconduct by deliberating prematurely and reviewing extraneous prejudicial information. The Defendant argues that the jurors began deliberating during the State's case-in-chief, that this

was brought to the attention of a court officer, and that the court officer took no action and did not inform the trial court about this misconduct. The Defendant further argues that the alternate juror presented extraneous prejudicial information to the other members of the jury during the course of the trial. The State responds that "a fair reading" of the testimony given by the alternate juror at a post-trial hearing establishes that the jurors did not prematurely deliberate. The State further responds that the Defendant has failed to prove that the jury was exposed to extraneous prejudicial information.

After the jury convicted the Defendant, two private investigators employed by her interviewed the alternate juror, Joseph Brian Creech, and surreptitiously recorded their conversation. In the conversation, Mr. Creech stated that he had complained to the court officer that another juror "wouldn't deliberate" and was "making comments, just a comment here or there getting all the buzz or something." The juror at issue was eventually excused from the jury due to a family emergency.

Mr. Creech also stated that after the jury returned its verdict, he "interviewed" the jurors about their decision. Mr. Creech told the investigators that several of the jurors thought a picture of the open Bible found in the victim's bathroom was "an eye-opener," "very critical," and "a transition point." Mr. Creech explained that the Bible was opened to Psalm 69 which "talk[ed] about preserving the inheritance of Israel . . . for the Jewish people." Mr. Creech further

explained that he believed the Defendant's desire to have her children, and not the victim's daughter, inherit all of her property was a motive for the murder. Mr. Creech also stated that after the picture was shown at trial, "people went back and read [Psalm 69] at the hotel."

Based upon Mr. Creech's statements to the Defendant's private investigators, he was subpoenaed to testify at a post-trial hearing. Mr. Creech testified that the jurors did not prematurely deliberate during the trial. According to Mr. Creech, a juror who was eventually removed for an emergency made "passing comments" on two occasions. Mr. Creech recalled that she said, "This is crazy. This is a waste of time, and I don't see any evidence of guilt here." Mr. Creech testified that he did not believe that the juror "thought she was [intentionally] deliberating by her actions" but that the other jurors told her that they did not "need to be talking about this."

Mr. Creech brought her statements to the attention of the court officer, who told him that they should "self-police" and "be on guard for that." Mr. Creech testified that he never discussed the evidence with the other jurors during the trial. Furthermore, he testified that everything he told the Defendant's investigators about what the other members of the jury thought about the evidence was based upon his conversations with the jurors "after they came back to the hotel after the verdict was passed down."

Mr. Creech testified that during the trial, a picture of an open Bible found in the victim's bedroom was shown to the jury. Psalm 69 was featured prominently in the picture, but a pair of glasses obscured some of the text and a glasses case covered the very last line of the psalm. Mr. Creech testified that after the picture was shown at trial, he read Psalm 69 "as well as other passages" from the Bible in his hotel room. Mr. Creech further testified that he did not discuss Psalm 69 with the other jurors during the trial.

According to Mr. Creech, after the verdict was returned, he asked some of the jurors about the picture, and they said "it was an interesting piece of evidence." Mr. Creech clarified that he "assumed [] based on their answers" that they had read Psalm 69 or "knew what that was" but that he was not aware of any of the other jurors having "looked at [an] unobstructed" version of Psalm 69. Mr. Creech testified that the last line of Psalm 69 was obscured but that "the majority of it [was] right there on the picture," including portions that stated that God's "people will live there and possess the land" and that "the descendants" of God's servants "will inherit it."

A. Premature Deliberation

Tennessee Rule of Evidence 606(b) provides that during an inquiry into the validity of a verdict,

> a juror may not testify as to any matter or statement occurring during the course of the

> jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improeprly [sic] brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

This court has previously held that post-verdict inquiries into whether a jury has prematurely deliberated are barred because premature deliberations do not involve extraneous prejudicial information or outside influence. *State v. Frazier,* 683 S.W.2d 346, 353 (Tenn. Crim. App. 1984); *see also State v. Aldret,* 509 S.E.2d 811, 815 n.5 (S.C. 1999) (citing *Frazier* for the proposition that Tennessee courts "disallow *any* inquiry into allegations of premature deliberations since such allegations do not involve an extraneous influence over the jury"). As such, the Defendant's inquiry into whether the jury deliberated prematurely was barred by Rule 606(b).

Furthermore, while he gave a somewhat confusing statement to the Defendant's investigators, Mr.

Creech testified to the trial court that the jurors did not prematurely deliberate during the trial. Mr. Creech further testified that a single juror made a few "passing comments" that the State had failed to meet its burden of proof but that the other jurors told her that they did not "need to be talking about this." We do not expect perfection from jurors and "[n]o normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters." *United States v. Klee,* 494 F.2d 394, 396 (9th Cir. 1974) (quoting *Winebrenner v. United States,* 147 F.2d 322, 330 (8th Cir. 1945) (Woodrough, J. dissenting)). Accordingly, we conclude that this issue is without merit.

B. Extraneous Prejudicial Information

Both the United States and the Tennessee Constitutions entitle a defendant to a trial by an impartial jury. U.S. CONST. amend. VI; TENN. CONST. art. 1, § 9. To ensure this right, a jury must be "influenced only by legal and competent evidence produced during trial." *State v. Hugueley,* 185 S.W.3d 356, 377 (Tenn. 2006) (quoting *State v. Lawson,* 794 S.W.2d 363, 367 (Tenn. Crim. App. 1990)). However, a defendant is entitled to a fair trial, not a perfect trial, and our ultimate inquiry "is whether the jury that tried the case was actually fair and impartial." *State v. Willie Calvin Taylor, Jr.,* No. W2011-00671-CCA-R3-CD, 2012 WL 2308088, at *6 (Tenn. Crim. App. June 18, 2012).

A new trial may be warranted when a jury has been exposed to extraneous prejudicial information. *Carruthers v. State,* 145 S.W.3d 85, 92 (Tenn. Crim. App. 2003). Furthermore, "when it has been shown that a juror was exposed to extraneous prejudicial information or subject to improper influence, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or demonstrate that it was harmless." *Walsh v. State,* 166 S.W.3d 641, 647 (Tenn. 2005). Extraneous information is "information from a source outside the jury." *Carruthers,* 145 S.W.3d at 92 (citing *Caldararo v. Vanderbilit* [sic] *Univ.,* 794 S.W.2d 738, 742 (Tenn. Ct. App. 1990)). A jury's consideration of "facts not admitted in evidence" is an external influence that may "warrant a new trial if found to be prejudicial." *Id.*

Before a new trial will be warranted, the extraneous information must be determined to have been prejudicial. *David Keen v. State,* No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, at *31 (Tenn. Crim. App. June 5, 2006), *perm. app. denied,* (Tenn. Oct. 30, 2006). Rule 606(b) permits "juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative process is inadmissible." *Walsh,* 166 S.W.3d at 649. As such, we "may only determine prejudice from the content" of the alleged extraneous information. *Keen,* 2006 WL 1540258, at *31.

We begin by noting that the testimony and statements of Mr. Creech regarding the effect of Psalm 69 on him or other members of the jury were inadmissible pursuant to Rule 606(b). Generally, readings from the Bible that are not particular to the defendant, the victim, or the facts and legal issues of a case are not considered prejudicial extraneous information. *Keen,* 2006 WL 1540258 at *31. Here, the Defendant argues that the references in Psalm 69 to "the descendants" of God's servants inheriting the land could be considered evidence of the Defendant's motive to murder the victim.

However, those references are not obstructed and are readable in the picture of the Bible that was introduced into evidence at trial with no objection from the Defendant. The only line of the psalm which was completely obscured was the last line, which states as follows: "and those who love his name shall live in it." *Psalms* 69:36 (NRSV). As such, we cannot conclude that the jury's possible exposure to an "unobstructed" version of Psalm 69 was prejudicial. *See Keen,* 2006 WL 1540258 at *32 (stating that a "finding of reversible prejudicial error cannot be based on a mere possibility that a juror was improperly influenced"). Furthermore, there was no evidence that any of the jurors besides Mr. Creech, the alternate juror, read Psalm 69 in its entirety. *See Taylor,* 2012 WL 2308088, at *7 (concluding that because "the only testimony on the record indicate[d] that the jury as a whole . . . was not exposed to extraneous information"

the defendant was not entitled to a new trial). Accordingly, we conclude that this issue has no merit.

IX. Alleged Brady Violation and Newly Discovered Evidence

The Defendant contends that the State withheld exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and that she is entitled to a new trial based upon this newly discovered evidence. According to the Defendant, after her trial, she received a statement from former KCSO Sergeant Steve Robinson that he was the first police officer to arrive at the victim's house and that he witnessed another officer remove the gun from the house. The State responds that there was no *Brady* violation because Sgt. Robinson's statement did not exist until after the Defendant's trial. The State further responds that a new trial is not warranted because Sgt. Robinson recanted his statement that another officer removed the gun from the house, and because Sgt. Robinson's statement that he was the first officer on the scene was not so crucial to the Defendant's guilt or innocence that its admission would have probably resulted in an acquittal.

After the Defendant's trial, Sgt. Robinson had a chance encounter with one of the Defendant's private investigators. As a result of their conversation, Sgt. Robinson signed an affidavit in which he stated that he and KCSO Officer Joe Preston were the first two officers to arrive at the victim's house on March 13,

2003, that he saw the Defendant come out of the house "screaming" that the victim had killed himself, and that he later saw Officer Preston come "out of the residence holding a weapon and confirmed that the victim was dead" before returning "inside the residence with the gun in his hand."

Sgt. Robinson later spoke with Det. Moyers about the affidavit and recanted his statement that Officer Preston removed the gun from the victim's house. Officer Preston told Det. Moyers that Sgt. Amburn and Chief Lyon were already at the victim's house when he and Sgt. Robinson arrived. Officer Preston further stated that he and Sgt. Robinson "had nothing to do with" the investigation in this case and that they were only at the scene "for just a few minutes." Officer Preston told Det. Moyers that Sgt. Robinson's affidavit was "not true at all" and "a lie." Officer Preston stated that he briefly entered the house to check on Chief Lyon, but he did not enter the bedroom or touch anything inside the house.

Sgt. Robinson testified via telephone at a post-trial hearing on this matter. Sgt. Robinson testified that he had told the Defendant's private investigators that he and Officer Preston were "one of the first, if not the first, car to get there" and that they found the Defendant "outside of the house, very upset." Sgt. Robinson admitted that he told the investigators that he saw Officer Preston walk "out of the house with the weapon." Sgt. Robinson testified that the affidavit, at the time he signed it, represented his recollection of what happened on March 13, 2003.

However, Sgt. Robinson testified that after signing the affidavit, he "subsequently thought about" what happened on March 13, 2003, "a lot" and realized that he had "misremembered" what happened and that his "recollection was wrong." Sgt. Robinson testified that he never saw Officer Preston come "out of the house with the weapon." Sgt. Robinson further testified that Officer Preston was too good of a police officer to do something like move a possible murder weapon and that Officer Preston "absolutely did not do that."

Sgt. Robinson also testified that when he arrived at the house, the Defendant was "on the porch" and "extraordinarily upset." Sgt. Robinson could not recall if Sgt. Amburn was there and testified that he was "so focused on" the Defendant that he could not remember who any of the other responding officers were. Sgt. Robinson also did not recall the Defendant's coming out of the house screaming and was unsure why that was in his affidavit. Sgt. Robinson testified that he "obviously misremembered that." Sgt. Robinson admitted that his recollection of March 13, 2003, was "not that good." Sgt. Robinson testified that he never went into the victim's house that day.

A. Brady Violation

As previously stated, in order to ensure a defendant's constitutional right to a fair trial, the State must provide the defendant with exculpatory evidence that is either material to guilt or relevant to

punishment. *Ferguson,* 2 S.W.3d at 915. This also includes evidence which could be used to impeach the State's witnesses. *Johnson v. State,* 38 S.W.3d 52, 56 (Tenn. 2001). However, the State is not required to disclose "information that the accused already possess or is able to obtain, or information which is not possessed by or under the control of the prosecution or another governmental agency." *State v. Marshall,* 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992) (internal citations omitted).

The State is also not required "to seek out exculpatory evidence not already in its possession or in the possession of a governmental agency." *Marshall,* 845 S.W.2d at 233; *see also State v. Brownell,* 696 S.W.2d 362, 363 (Tenn. Crim. App. 1985) (noting that the "State is under no obligation to make an investigation, or to gather evidence, for the defendant"). Likewise, when "evidence does not exist the State cannot be charged with suppressing it." *Brownell,* 696 S.W.2d at 364. Additionally, there is no constitutional requirement that the State "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Johnson,* 38 S.W.3d at 56 (quoting *State v. Walker,* 910 S.W.2d 381, 389 (Tenn. 1995)).

Sgt. Robinson's statements to the Defendant's private investigators and his affidavit did not exist until after the Defendant's trial. Sgt. Robinson's name did not appear on the crime scene log, and there is no evidence in the record that Sgt. Robinson ever made similar accusations prior to his conversation with the

Defendant's investigators. As such, the State cannot be faulted for suppressing evidence which did not exist until after the Defendant's trial was completed. Instead, we examine whether the State committed a *Brady* violation by failing to disclose Sgt. Robinson's name to the Defendant.

We first note that Sgt. Robinson testified that he spoke with the Defendant at her house on March 13, 2003. Therefore, the Defendant should have been aware that Sgt. Robinson was one of the first police officers to respond to her 911 call, and the State cannot be faulted for failing to disclose information already in her possession. Nor does *Brady* require the State to "make a complete and detailed accounting" of the police investigation. *Johnson,* 38 S.W.3d at 56.

Sgt. Robinson was one of several officers to respond to the victim's house that day. Sgt. Robinson's name was not recorded on the crime scene log because he never entered the house and he was only at the scene for a short period of time. Additionally, Sgt. Robinson arrived at the victim's house with Officer Preston, and Officer Preston's name was on the crime scene log provided to the Defendant. Furthermore, as we will discuss more fully below, the proof established at the post-trial hearing showed that Sgt. Robinson possessed no exculpatory evidence. Accordingly, we conclude that the State did not commit a *Brady* violation by failing to provide the Defendant with Sgt. Robinson's name.

B. Newly Discovered Evidence

A new trial will be granted on the basis of newly discovered evidence only when a defendant has established the following: "(1) reasonable diligence in attempting to discover the evidence; (2) the materiality of the evidence; and (3) that the evidence would likely change the result of the trial." *State v. Caldwell,* 977 S.W.2d 110, 116 (Tenn. Crim. App. 1997) (citing *State v. Goswick,* 656 S.W.2d 355, 358-60 (Tenn. 1983)). The decision to grant or deny a new trial on the basis of newly discovered evidence "rests within the sound discretion" of the trial court. *Id.* at 117.

This court has previously held as follows:

> When it appears that the newly discovered evidence can have no other effect than to "discredit the testimony of a witness at the original trial, contradict a witness' statements or impeach a witness," the trial court should not order a new trial "unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a different result at trial would necessarily follow."

Caldwell, 977 S.W.2d at 117 (quoting *State v. Rogers,* 703 S.W.2d 166, 169 (Tenn. Crim. App. 1985)).

Sgt. Robinson's statements that he and Officer Preston were the first officers to arrive at the victim's house and that the Defendant was "screaming" and "extraordinarily upset" would have no other effect

than to contradict Sgt. Amburn's testimony at trial. We cannot conclude that Sgt. Robinson's statements on these issues were "so strong and convincing that a different result at trial would necessarily follow." In his testimony before the trial court, Sgt. Robinson contradicted the statements in his affidavit. Sgt. Robinson testified that he was "one of the first, if not the first" officers to arrive and that he had [sic] did not recall the Defendant running out of the house screaming. Furthermore, Officer Preston stated that Sgt. Amburn and Chief Lyon were already at the house when he and Sgt. Robinson arrived. Additionally, although Sgt. Amburn testified that the Defendant initially was "motionless," after he touched her she became "very hysterical." Accordingly, we do not believe that these minor contradictions would have necessarily resulted in a different result at trial.

In sworn testimony before the trial court, Sgt. Robinson recanted the statement in his affidavit that he witnessed Officer Preston remove the gun from the victim's house. As such, the only newly discovered evidence supporting the Defendant's claim that Officer Preston removed the gun from the house is the now discredited affidavit. Sgt. Robinson's affidavit by itself would be inadmissible at trial as hearsay. *See* Tenn. R. Evid. 802. Nor could the Defendant call Sgt. Robinson to testify at trial for the sole purpose of impeaching him with his prior inconsistent statement. *See* Tenn. R. Evid. 607, Advisory Comm'n Cmts. (stating that "[d]ecisional law prohibits a lawyer from calling a witness-knowing the testimony will be

adverse to the lawyer's position-solely to impeach that witness by an inconsistent statement").

More importantly, Sgt. Robinson's recantation of his statement and Officer Preston's vigorous denial that he removed the gun from the house call the validity of the affidavit into serious doubt. Sgt. Robinson testified at the post-trial hearing that his recollections in the affidavit were "wrong" and that his memory of March 13, 2003, was "not that good." As such, the Defendant has failed to meet her burden to show that the affidavit would likely change the result of the trial. Accordingly, we conclude that the trial court did not error in denying the Defendant's request for a new trial on the basis of newly discovered evidence.

X. Thirteenth Juror

The Defendant contends that the trial court, by accepting the jury's guilty verdict, "abdicated" its role as the thirteenth juror. The Defendant argues that no "rational person, based on the evidence . . . could have possibly convicted [her] on the scant evidence presented in this case." Essentially, the Defendant raises this issue in an attempt to reargue her contentions on the sufficiency of the evidence. The State responds that the trial court expressly approved the jury's verdict in its written order denying the Defendant's motion for new trial; therefore, the trial court fulfilled its duties as the thirteenth juror.

Tennessee Rule of Criminal Procedure 33(d) provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This is the modern equivalent of the thirteenth juror rule and "imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." *State v. Biggs,* 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006) (quoting *State v. Carter,* 896 S.W.2d 119, 122 (Tenn. 1995)) (internal quotation marks omitted).

We "may presume that the trial court approved the verdict as the thirteenth juror" when it has overruled a motion for new trial without comment. *Biggs,* 218 S.W.3d at 653 (citing *Carter,* 896 S.W.2d at 122). It is only when "the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or [evidence] indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, [that] an appellate court may reverse the trial court's judgment" on the basis that the trial court failed to carry out its duties as the thirteenth juror. *Carter,* 896 S.W.2d at 122.

Here, the trial court did more than simply deny the Defendant's motion for new trial without commit [sic]. The trial court reviewed the evidence as well as the applicable law and expressly approved the jury's verdict in its written order denying the motion.

Therefore, the trial court fulfilled its duty as the thirteenth juror. The State is correct in its assertion that an allegation that the trial court "abdicated" its role as the thirteenth juror is not a proper vehicle to challenge the sufficiency of the convicting evidence. The mere fact that the trial court approved the jury's verdict which was adverse to the Defendant did not evidence that the trial court failed to fulfill its duty as the thirteenth juror. Accordingly we conclude that this issue is without merit.

In a one-sentence argument citing only to a news media article, the Defendant contends that Judge Richard Baumgartner could not fulfill his duty as the thirteenth juror because he was "under the influence of drugs." The Defendant has failed to make any argument to support this contention beyond the conclusory sentence included in her brief. The Defendant has also failed to supply any citations to the record or legal authorities to support this contention. As such, the Defendant has waived review of the issue in this court. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.").

Furthermore, there is no evidence in the record before us that Judge Baumgartenr [sic] was intoxicated or incompetent at the time he approved the jury's verdict and denied the Defendant's motion for new trial. *See State v. Manuel Haynes,* No. W2009-00599-CCA-R3-CD, 2010 WL 2473298, at *10 (Tenn. Crim. App. June 17, 2010), *perm. app. denied,* (Tenn.

Nov. 12, 2010) (concluding that a new trial was not warranted when, despite the defendant's argument to the contrary, there was "no proof in the record that any juror was intoxicated during the trial"). Likewise, a trial judge's misconduct outside the courtroom does not constitute structural constitutional error "when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings." *State v. Letalvis Cobbins, LeMaricus Davidson, and George Thomas,* No. E2012-00448-SC-R10-DD, *slip op. at 3* (Tenn. May 24, 2012) (order vacating grant of new trials for the defendants). Based upon the record before us, we conclude that this issue is without merit.

XI. Cumulative Error

The Defendant contends that, even if no single error requires a new trial, the cumulative effect of multiple errors mandates such action. The Defendant argues that there were several errors during the course of her second trial and that these errors deprived her of a "fair and meaningful defense." The State responds that there can be no cumulative error because the Defendant "failed to prove a single basis for reversal and remand for a new trial."

The cumulative error doctrine applies to circumstances in which there have been "multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but when aggregated, have a cumulative effect on the proceedings

so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester,* 324 S.W.3d 1, 76 (Tenn. 2010). However, circumstances which would warrant reversal of a conviction under the cumulative error doctrine "remain rare." *Id.* Having discerned no error during the Defendant's second trial, there can be no cumulative error. Accordingly, we conclude that this issue is without merit.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

/s/ D. Kelly Thomas
D. KELLY THOMAS, JR., JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v.
RAYNELLA DOSSETT LEATH

Criminal Court for Knox County
No. 85787

No. E2011-00437-SC-R11-CD

ORDER

(Filed Nov. 13, 2013)

Upon consideration of the application for permission to appeal of Raynella Dossett Leath, and the record before us, the application is denied.

PER CURIAM

Tennessee Rule of Criminal Procedure

Rule 31. Verdict

* * *

d) Conviction of Lesser Offense.

(1) *Definition of Lesser Included Offense.* The defendant may be found guilty of:

(A) an offense necessarily included in the offense charged; or

(B) an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(2) *Procedures When No Unanimous Verdict.* If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

(e) Poll of Jury. After a verdict is returned but before the verdict is recorded, the court shall – on a party's request or on the court's own initiative – poll the jurors individually. If the poll indicates that there

is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

IN THE CRIMINAL COURT FOR
KNOX COUNTY, TENNESSEE

DIVISION I

AT KNOXVILLE, TENNESSEE

STATE OF TENNESSEE	:	
VS.	:	CASE NO. 85787
RAYNELLA LEATH	:	

This case came on to be heard for Trial and was heard on the 11th day of March, 2009, before the Honorable Richard R. Baumgartner, Judge, holding the Criminal Court for Knox County, Division I, at Knoxville, Tennessee, when the following proceedings were had:

(Whereupon, the jury reported directly to the jury room and started deliberations at 8:59 a.m.)

(Whereupon, the jury took a lunch break from 12:00 p.m. to 12:33 p.m. and then resumed deliberations at that time.)

THE COURT: Did you read this?

COURT OFFICER: I'm sorry?

THE COURT: Did you read this?

[2] COURT OFFICER: I did. Actually it was handed to me open, I couldn't –

THE COURT: We need to round up the posy [sic].

(Whereupon, the matters in another case were taken up.)

THE COURT: Have a seat. Well, I got a note from the jury that reads, "We have a hung jury at this time. Please instruct us." Not a note I was hoping to receive. But that's the note we've received. So, what would you suggest I do?

MR. BELL: May I take a moment, your Honor, and discuss this with Ms. Leath as to the choices?

THE COURT: Yes, ma'am. Yes, sir.

MR. BELL: Thank you. May we approach the bench? Counsel and I?

(Whereupon, a bench conference was held as follows:)

MR. BELL: Do you have an idea how they're split?

THE COURT: No. I have no idea. And I cannot – nor am I asking.

MR. BELL: I understand that. You know, sometimes they, you know, say –

THE COURT: No, they didn't – there's no indication if it's 11 –

[3] MR. BELL: Okay.

THE COURT: – to one, six to six.

MR. BELL: Okay. Let me talk to her a minute.

(Whereupon, said bench conference was concluded.)

MR. BELL: May we approach, your Honor.

(Whereupon, a bench conference was held as follows:)

MR. BELL: I can't do the math, what have they been out, eight hours? It looks to me like you're at a mistrial.

THE COURT: Well, I'm not ready to declare a mistrial yet.

MR. BELL: To which my client agrees. For the record, to which my client agrees.

THE COURT: On the other hand, it's not appropriate to give them any type of – in my judgment any type of charge other than to reread to them the last page of the standard jury charge which I've already read to them once.

MR. BELL: And they've got a copy of it.

THE COURT: And they've got a copy. And the only thing I can do is reinforce is what's written on this piece of paper.

MR. BELL: Well, it seems to single it out. [4] If you do that I would ask that you – if you're going to give what's known as the Allen Charge is

that you remind them that the burden remains on the State to prove her guilty beyond a reasonable doubt.

MR. MCCOIN: That's already in the instruction.

MR. BELL: Well, I understand that, but still I think that tag line if you're going to give that portion of it. You know, and it never shifts and they've got to prove it.

THE COURT: All right. I will do that. And I'm going to remind them of all of – everything that I've instructed them previously still remains in effect.

MR. BELL: And they ought to review it.

THE COURT: And they are to look at all of that when they consider any of the – during all of their deliberations. But – with regard to their deliberations this is what should guide them in terms of their deliberation process. And this has been specifically approved –

MR. BELL: I understand.

THE COURT: – by the Appellate Courts –

MR. BELL: Right.

THE COURT: – now the Allen Charge, or any dynamite type charge –

[5] MR. MCCOIN: And –

THE COURT: And I don't intend to do that.

MR. BELL: Good.

THE COURT: I am going to say that – you know, that they've been through a grueling eight hours and we'd like them to continue.

MR. BELL: Some judges have asked the question, would further deliberations be helpful.

THE COURT: And I might ask that. And say, now, if you tell me that no further deliberations would be –

MR. BELL: Fruitful –

THE COURT: – fruitful, then I'm not going to make you do it, but on the other hand, if you think you can – and if you think that you've done as much today as going to be fruitful, and it would be good for you to stop today and come back tomorrow, we'll do that.

MR. MCCOIN: That's fine, your Honor.

THE COURT: Okay.

MR. MCCOIN: That's fair.

THE COURT: I'm just going to have to play it by – see what comes out of my mouth, that's the only way I can ever do it.

MR. BELL: Well, let's – okay. Thank you.

THE COURT: All right.

[6] MR. BELL: I'd like to stay with the written word. Thank you.

(Whereupon, said bench conference was concluded.)

THE COURT: All right. Bring them in.

(Whereupon, the jury returned to open court at 2:09 p.m. and, after the call of the jury was Waived by the parties, the following proceedings were had, to-wit:)

THE COURT: All right. The jury's back. Are you going to waive the call?

MR. BELL: We do, your Honor.

MR. MCCOIN: We do.

THE COURT: Very well. Thank you. Mr. Stensaker, how are you, sir?

JURY FOREPERSON: Fine.

THE COURT: How is the rest of the panel? Good to see you today. It's the first time I've seen you all as a group.

I got your note. And first of all, let me say, we deal with these situations, it's part of trials sometimes that we have to encounter. We understand that. No one is upset about it. There are a couple of questions I want to ask you and a couple of things that I want to say to you.

[7] First of all, of course, you've been working five hours today. You've been – you've had lunch. You, by our calculations, worked a little bit – in straight deliberations worked a little bit over eight hours total deliberating in this case, which is a – which is a fair amount of time. It's not a great amount of time, but it's a fair amount of time. And – but in terms of straight deliberations, that's, you know, a significant amount of time.

Obviously, everybody in the case would like to have a resolution to it if that's possible. Sometimes that's not possible. And we understand that.

So there are a couple of questions that I would like to ask you. Sometimes you reach a point in a case where – where you just reach longer heads and you're not able to reach a unanimous verdict. And you could go on for the rest of your lives and not be able to reach that verdict. And it becomes pointless after some point in time of trying to go any further. And when that time comes, we need to stop. I mean, that's clear. And that time has come in previous cases. That time will come again in future cases.

So, I guess, the first question that we all need to ask you is, you know, do you feel that you've come to those – to that point in your deliberation process [8] where there just is absolutely no opportunity, given the chance to talk further, where you could possibly resolve your differences in this case? Have you just come to that point where – where there's no further room for discussion? No further room to listen to one

another with an eye toward reaching an agreement in this case?

I mean, Mr. Stensaker, you're the foreperson of this jury, what is your opinion on that?

JURY FOREPERSON: What it has come down to, sir, is –

THE COURT: Don't – don't – let me caution you about a couple of things. Don't throw out any numbers in terms of –

JURY FOREPERSON: I understand.

THE COURT: – we're split this way.

JURY FOREPERSON: I didn't intend to.

THE COURT: Okay.

JURY FOREPERSON: This all hinges on the philosophical difference between accepting circumstantial evidence. I had a well defined description of that and we debated that at great length. But some feel that they have to have a smoking gun and that evidence is not clear here, and those people are irresolute in their opinion of that. So it's a philosophical difference.

THE COURT: And then there are others on the [9] other side of the fence who are – who have a strong opinion that – the other way, I guess?

JURY FOREPERSON: Yes, sir. It's very lopsided.

THE COURT: And you don't think that there's any way to resolve that – that divide?

JURY FOREPERSON: We have been told by the dissenting party that they will never change their mind.

THE COURT: So what you're telling me is, you see no – you see no room for compromise, no room for further negotiation that's going to be fruitful?

JURY FOREPERSON: We all have had a fairly open mind and have made logical arguments, but, again, it comes down to the fact that some people would not be satisfied unless there were, for sake of the argument, several eyewitnesses to the deed. And that doesn't exist.

THE COURT: Well, let me ask the rest of you. You've heard what Mr. Stensaker had to say about this, would you – do you all agree that that's the case? Do you all agree that there's no – there's no further room for – and nobody's right or wrong. Let me tell you, nobody is right or wrong here. That's why we have 12 member juries. That's why we require 12 people to decide and be unanimous in their decision. It doesn't mean you're right or wrong about your position. Okay? So [10] don't anybody be embarrassed about the fact that they have an opinion.

The question is is there room for further negotiation? Is there room for further compromise? Is there room for further area for discussion? And you're telling me there's not.

I mean, I'm not going to make you sit out there in that room and look at the Tennessee River for the next two days if you're not – if you're not going to arrive at a decision. Okay? But if you can, I want you to be – I want you to do it. I want you to work some more. Do you all need to go home? If you need to go home, raise your hand? Or do you want to stay a little longer? I'll give you another option. You need to go home this afternoon and come back tomorrow morning and get a good night's sleep? No. Do you want to go back out and work the rest of the afternoon? You tell me. I don't know. I haven't been in the room, folks. I don't know the answer to the question.

JURY FOREPERSON: We need a suggestion from You, sir.

THE COURT: My preference? My preference would be that you go back out and you work a little longer and see if you can – see if you can resolve your differences.

JURY FOREPERSON: All right. We'll do that, [11] sir.

THE COURT: All right. Now, don't get in any fist fights. Okay? And don't – let me remind you now – you can be seated. Take these instructions, go through all of the instructions, take all of that into consideration. Look at the last page of these instructions, it gives you some guidance on what you're supposed to do when you talk to each other. You know, take everybody else's opinion into consideration. Don't hesitate to reexamine your own position and

change your opinion if you're convinced you're wrong. But don't change your opinion just to reach a verdict if you're convinced you're right. Okay? You have to be sure in your own mind that you're right about what you're doing. But you also have to be open to listen to your fellow jurors and listen to their point of view. Okay?

So read that last page. Read the rest of the instructions. That doesn't mean you don't hold the State to their burden of proof. It doesn't mean you don't listen to all the other instructions. You have to do all of those things. But reread that last page because that will give you some guidance in how you go about your deliberation process. Okay?

If you can reach a verdict, fine. If you can't reach a verdict, you haven't done anything wrong. Okay? [12] You've done what you've been called in here to do. So nobody is going to be mad at you and nobody is going to be upset with you. All right? All right.

Take a break and go outside and stretch your legs and get some fresh air and take another shot at it. (Exhibit No. 104 – marked for Identification)

(Whereupon, the jury retired from open court at 2:18 p.m. to further deliberate.)

MR. BELL: Can we approach a minute, Judge?

THE COURT: Yes, sir.

(Whereupon, a bench conference was held as follows:)

MR. BELL: Comes now Raynella Dossett Leath and moves the Court to go ahead and enter a mistrial order. I feel like the – on her behalf that the Court's recent colloquy between the foreman and the rest of the jury is tantamount to the Allen Charge and it singles out – unreasonably singles out the situation with – although you did temper it, frankly, with read the entire instructions, but that's my motion for the time being.

THE COURT: I thought it was downright brilliant myself, but –

MR. BELL: Not on this side of the bench – I'm going to tell you like I told Kim Porter, you're not on this side – you're not over here in the pit.

[13] MR. MCCOIN: – determine, your Honor, whether they're 11 to one or –

MR. BELL: You don't know. You have no idea.

MR. MCCOIN: It is apparent that there is more of a conviction probably than not, but –

MR. BELL: You can't get that read.

THE COURT: I don't know –

MR. MCCOIN: Well, that's my read.

THE COURT: I don't think that's –

MR. MCCOIN: I just think it's –

MR. BELL: He said there's several or a couple.

MR. MCCOIN: He used the singular and plural.

MR. BELL: I'm not –

THE COURT: Mr. Bell, I think it was a well made motion, and it's noted on the record. I think I was very fair in the way I approached that, and they all indicated that they would go back and talk some more and see if they could resolve their differences. And if they can't, they can't.

I told them not to give them up their well founded position. If they felt that way about it, that they should maintain that. I don't think I could have been any fairer if I tried.

MR. BELL: You were a good trial lawyer once, you know what I'm doing.

[14] THE COURT: I think we've fairly stated the issues. Let's see what happens.

(Whereupon, said bench conference was concluded.)

THE COURT: All right.

(Whereupon, another matter on the docket was taken up.)

THE COURT: I have another note, it says, "We are closer to a decisive" – on top of that "unanimous, verdict, but want to leave now and want to come back tomorrow. Mr. Stensaker on behalf of the jury." So I'm going to let them do that.

MR. BELL: Well, your Honor, for the record, if it please the Court. I would note that I would renew the motions I made at the bench earlier. At 1:58 the Court brought them in. As I recall, they retired right around 2:19. I think we're almost getting to the degree that it's tantamount to the Allen Charge that's it's almost compulsory for them to reach a verdict.

Earlier when you polled the jury there was some nods of the head that they couldn't reach a verdict. I couldn't four, maybe more. Others may have counted less. I –

MR. MCCOIN: Your Honor, I object to that. There's no reflection in this record as to any –

[15] MR. BELL: No, you can't – you can't record a vote, but, you know, the Court can record what the Court remembered a number of heads shaking and nodding. But, my concern is is that we are in a level now where the jury feels compelled to render a verdict. And I think we've now reached the level that it is tantamount to that which is being condemned about the Allen Charge. We've singled out the last page of your instruction, which, of course, encourages the jury to exercise their duty to deliberate with a goal in mind of reaching and returning

a unanimous verdict. There's also the equivocating language in there, I realize that. But if you do do that again I would request again that you charge them on circumstantial evidence and reasonable doubt so that it doesn't unfairly pull out one and put undue influence on the last page of your charge because all parts of your instruction are as equally important as one. The last page is no more important than the first page.

And so it's for those reasons we would renew those matters we made at the bench around 1:58 through 2:19 p.m. today conclusive.

THE COURT: Do you want to say anything?

MR. MCCOIN: No. We don't object to that,

your Honor.

THE COURT: Very well. Well, my recollection [16] of the meeting there this afternoon was that they came in and reported what they reported, which is on the record.

MR. BELL: Yes, sir.

THE COURT: And, again, my response to them is going to be on the record. But my recollection of that was that I thought I was very – very – I don't know that I would use the word brilliant, but I thought I was very fair in telling them what I thought their duties was. And I didn't think I stressed – I

think I made it very clear to them that, you know, if they could reach a verdict that that would be good.

But I also made it very clear to them that not reaching a verdict was certainly an option. And that they were just as much doing their job if they could not reach a verdict as they were by reaching a verdict. And when I told them to reread that last page about their – about their – about the deliberation process, I pointed out to them that they should listen to each other, they should listen to each other's points of view, they should be willing to compromise if they can do that, listen to what each other has to say, but if – but on the other hand, not give up strongly held points of view just for the purpose of reaching a verdict.

I mean, I did not – I did not – I felt as though I did not encourage them to in any way compromise [17] their personally held beliefs.

MR. BELL: Well, and you and I do this every day of our lives. And to a layman coming from, as we all talk about big daddy on the bench with the black rob [sic], it may appear to be something in the nature of an equivocating nudge to move things along here.

I said what I needed to say, and I think my record is –

THE COURT: Well, do you want me to ask them this, because I will if you want me to, I will ask

them if anyone on this jury feels that I have – that I have tried to influence them to –

MR. BELL: I don't think you can do that. I think –

THE COURT: No. Listen to what I'm going to say.

MR. BELL: Yes, sir.

THE COURT: If I tried to – if anything that I've said this afternoon has put it in their mind that I'm trying to push them or influence them to reach a verdict when they don't feel they can. And if they have gotten that feeling, I don't want them to have that feeling. Do you want me to ask them that?

MR. BELL: I think that question or some other fair – or structured way of doing that would be [18] appropriate. But I'm still not giving up on my motion.

THE COURT: I understand. You're not. Of course, you're not.

MR. MCCOIN: I would submit that the jury itself has asked to stay. You haven't asked it to stay. You've given them the option. Those others are unnecessary. If the Court wishes to do so, I understand, but they have made the request to stay. And I think that says –

THE COURT: I just want to be – I want to be comfortable in my own mind that they're not – that I'm not influencing them. And he's right to a

certain degree that – you know, it always amazes me because, you know, I don't know why, I guess it's good, I guess, in a sense that people think you have a certain amount of sway that you know you don't have, but, you know, I want to make sure that people don't think that I'm – that I have some kind of influence on this case that I don't intend to have or intend to exercise. I mean, that's not – I mean, they're the ones that have the say so in this case at this point. And I want them to understand that.

MR. MCCOIN: Yes, sir.

THE COURT: I don't care what they do, you know, I just want them to do their job. And what verdict they come up with or don't come up with doesn't matter to [19] me one way or the other. And I want them to understand that. So I'm comfortable with where I am.

So bring them in.

(Whereupon, the jury returned to open court at 5:15 p.m. and, after the call of the jury was waived by the parties, the following proceedings were had, to-wit:)

THE COURT: The jury's back, do you waive the call?

MR. BELL: We do, your Honor.

THE COURT: Mr. Foreman, do you care if people know what your name is out there in the world?

JURY FOREPERSON: No, it's been spoken many times.

THE COURT: Okay. Because it was just pointed out to me that I used your name and it's going out over the air.

JURY FOREPERSON: I'm aware of that.

THE COURT: Okay. Well, very good. Well, I've got another note from you here. I've already read it for the panel – or to the members of the courtroom here, and I'm going to read it again, so that the – I'm sure the rest of the panel has heard it, but it says, "We are closer to a decisive verdict," over that being unanimous verdict, "we want to leave now and come back tomorrow." [20] And I think that's fine. I have no objection to that.

I do – I do – I've had some discussion with the lawyers here and I just want to make certain about one thing. And I'm trying to think of how to exactly word this. And I'm not going to know how it comes out until I say it, so let me just see – let me just see how it comes out. I want to make absolutely certain with everybody on this jury about one thing, and that is, that – that I want to make certain that everybody over there, all 12 of you understand that I have no – absolutely no vested interest in how this case comes out. I don't care what the verdict is in this case. I don't care if there is a verdict in this case. It makes no difference to me if you are or are not able to reach a verdict. Okay?

And I want to make sure that my conversation with you earlier this afternoon about this case does not imply or in any way suggest to you that – that I think you should or should not do anything in this case. In other words, when I said to you that I think you should work a little longer in the case, I was not trying to suggest to you that you should do that because I think you should have some particular outcome in this case. All right?

I don't want you to think that I'm – that the Court is having you deliberate in this case because I want [21] you to have some particular outcome. That's not my objective. If you reach an outcome, fine. If you don't reach an outcome, fine. It does not matter to me. And you – it does not – you've done your job regardless of what the outcome is. Does everybody understand that? Have I influenced any of you in any way to make you think that I think it ought to come out one way or the other? Can you all assure me that – that you understand what your job is and we haven't put any influence on you one way or the other? Good. Because I certainly don't want that to be the case. All right.

I think you're smart. I think a lot of times – and, you know, deliberations are probably the toughest part of any kind of case. You sit there for several hours in a row and debate with one another. That's a tedious thing to do. So I think it's smart for you to go home. If you're making progress, that's great. That's great. So go home tonight, listen to your favorite music, relax, eat a good meal, and avoid publicity

about the case, don't talk to each other, don't e-mail each other, and come back tomorrow morning. And if you can work – if you can resolve your differences, fine. And if you can't, fine. Okay?

Anybody got any questions?

JURY FOREPERSON: A comment, sir. I commend my [22] fellow jurors. We have very objectively been looking at evidence. No one has been coerced in any way. We've all been very mutually respectful of each opinion. And we intend to come in with a fair unanimous verdict.

THE COURT: If you can do that, that's great. If you can't do it, that's fine. Okay? That's the way I feel about it. So – you've been a great jury. You've been very attentive. You've asked great questions. You've listened. You've put up with delays. You couldn't ask for a better jury. So, you've done a wonderful job. And I look forward to seeing you tomorrow.

Have a great night, ladies and gentlemen.

(Exhibit No. 105 – marked for Identification)

(Whereupon, the jury retired from open court at 5:21 p.m. for the day to return on March 12, 2009 for deliberations.)

* * *

[36] THE COURT: Ready to end the case?

MR. BELL: Have we got a verdict?

THE COURT: No, sir.

MR. BELL: Oh.

THE COURT: Bring in the jury.

(Whereupon, the jury returned to open court at 10:42 a.m. and, after the call of the jury was waived by the parties, the following [37] proceedings were had, to-wit:)

THE COURT: All right. Jury's back. You want to waive the call?

MR. MCCOIN: Waive the call.

MR. BELL: We do, your Honor.

THE COURT: Mr. Stensaker, I've got your note and I'm going to read it, and it says that the jury remains hung with no further possibility of compromise.

JURY FOREMAN: That's correct.

THE COURT: And this morning, of course, you've deliberated all day yesterday, we had a conversation yesterday afternoon and again last evening before you retired, and you've come back in this morning with this – with this position. And I'm prepared to take this – this position today without any further discussion about that. I take your word for that.

I think you've all worked very hard. As I told you yesterday, there's absolutely nothing wrong with this result. Sometimes you're not able to reach a unanimous verdict. That doesn't mean you haven't done

your job. I think you've all worked very hard. You've heard a lot of evidence in this case. You've done exactly what we've asked you to do and that is, that each of you have to look at the evidence for yourself. You have to weigh that evidence in your own mind. You have to be satisfied in [38] your own mind about what that evidence means. And you have to evaluate that for yourself.

And once you've done that then you have to all agree with each other. And you're not to give up your own individual conclusions or do violence to your own individual justice, the only – justice in your own mind just for the mere purpose of reaching a verdict. And apparently, you were not able to do that as a group of twelve. And if you're not able to do that, you can't reach a unanimous verdict. And that doesn't mean you haven't done your job. You have done your job.

So, what I'm going to do is I'm going to declare a mistrial in this case. And we will see what develops. There are various options to pursue in the future.

Mr. Bell?

MR. BELL: May I address the jury, your Honor?

MR. MCCOIN: I think that's unnecessary.

THE COURT: I don't think –

MR. BELL: They have worked hard and I wanted just to say – I mean, you know, we're all human beings, the only thing I want to do is thank

them. I'm sure the prosecution does too. We're all human.

THE COURT: Just very briefly.

MR. BELL: That's all I wanted to do is just – [39] whatever which way you did you did justice, and thank you very much for your hard work. And I'm sure the prosecution would say the same thing.

MR. MCCOIN: The prosecution always respects the jury and its careful deliberations, and we feel the same way, your Honor. It should go without saying.

THE COURT: All right. So, you know, you've given up several days of your lives here to this, you've followed our instructions with regard to avoiding any publicity about the case. We greatly appreciate that. You've taken your time to be here every day. You've taken your time out of your normal daily activities, and it's been a sacrifice, I know that. I hope it's been an interesting experience for you.

I do want you to wait by for a few minutes outside so that I can talk to you for a minute before I excuse you, but I'm going to excuse you here.

I'll tell you right now, I know this is coming, and I'm going to talk to you outside about this. Because this has been the subject of some interest from local and national media I know that some of those people are going to want to talk to you, and let me tell you, and I think you all were probably here when I said

this to the other jurors that were excused the other day, and that is, these are the rules with regard to letting those individuals [40] talk to you. I don't object to you talking to media individuals or other individuals about your experience on the jury.

On the other hand, you have no obligation whatsoever to talk to anybody about your experience on this case. And – so it's entirely up to you. If you want to do that – they may even want to talk to you as a group, if several of you wanted to get together and talk to them as a group, they may want to do that. They may want to talk to you individually. You can do that if you want to do that. You do not have to do that. And all you have to do if you do not choose to do that is say, "I do not want to do that." And that should be the end of that conversation. If it is not the end of that conversation, you contact me. Okay? And I'll make certain that it's the end of that conversation.

But, like I said, I have no objection to it. I don't encourage or discourage it one way or the other, it's entirely up to you. I mean, there's no prohibition from you doing that. On the other hand, it's entirely up to you if you want to keep your experience private, that's your prerogative. So, I want to let you know that. But I do want to speak to you outside. And then we'll get you out of here today and let you go about your normal business.

[41] So, I want to thank you again, ladies and gentlemen, you've done a great service to the parties in this case, to this Court, to the citizens of Knox

County. And we greatly appreciate that. So if you would, you're excused from Court here, if you would, stand by for just a few minutes, I'll come out and see you, and then we'll let you go.

(Whereupon, the jury retired from open court at 10:49 a.m., and the following proceedings were heard outside their presence as follows:)

* * *

IN THE CRIMINAL COURT FOR THE SIXTH JUDICIAL DISTRICT KNOX COUNTY, TENNESSEE DIVISION I

STATE OF TENNESSEE, Plaintiff,	)	
v.	)	No. 85787
RAYNELLA DOSSETT LEATH, Defendant.	)	

MOTION FOR MISTRIAL

Comes the defendant, Raynella Dossett Leath, by and through the undersigned counsel, and moves the Court to enter an Order of Mistrial in this cause based on manifest necessity and/or the fact that the record reveals violations of the Constitutional rights of the defendant to a fair and impartial jury. In support thereof, the defendant would show:

1. On March 11, 2009, at approximately 2:00 p.m., the Court received a note from the jury foreman, which communication reflected that the jury "was hung" at that time and desired further instructions from the Court. In response, the Judge stated, "everybody in this case would like to have a resolution if that's possible." Counsel made an objection and requested a mistrial based on the fact that the jury was being improperly compelled to return a verdict. The Court reminded the jury

more than once that they should review the last page of the charge which contained language that contends with the procedure to reach a verdict without compromise. The Trial Court did not read the instruction at all, but rather told the jury themselves to review it.

2. The foreman of the jury then reported that the jury was deadlocked. The Court advised the foreman, "don't throw out numbers." But in spite of that admonition, the foreman stated that the jury was "very lopsided." More troublesome is the fact that the foreman went on to say that the split was based on a philosophical difference of opinion as to circumstantial evidence. The foreman further stated that some members of the jury felt that they could not reach a verdict based on circumstantial evidence alone and felt like they needed a "smoking gun" or "eyewitnesses to the deed". The foreman then went so far as to identify the existence of a particular "dissenting party" who had indicated to the rest of the jury that he or she would never change his or her mind. **See, Exhibit #1**.

3. The judge stated "I want you to work some more." The foreman reiterated the jury needed a suggestion from the Judge. In response, it is believed the judge stated that it was his preference that the jury go back out and work a little longer to see if they could resolve their differences. The jury foreman immediately agreed that the jury would do so.

4. The Judge further instructed the jury, "Don't get in any fist fights, okay. Let me remind you to take these instructions and look back over them, read the last page of these instructions to give you some guidance when to talk to one another. Take everybody else's opinion into consideration, don't hesitate to re-examine your own opinion and change your opinion if you are convinced you are wrong, but do not change it just to reach a verdict. You have to be sure in your own mind you are right at what you are doing. But you have to be open to listen to your fellow jurors and their point of view, so read that last page and the rest of the instructions. It does not mean you don't have to hold the state to their burden but re-read that last page for guidance."

5. Again, Counsel registered an objection at the bench, and the jury retired after the aforesaid instruction from the Court at approximately 2:20 p.m.

6. Tennessee law is very clear as to the proper procedures in the event the jury is deadlocked. As stated in *Kersey v. State,* 525 S.W. 2d 139 (Tenn. 1975), when faced with a deadlocked jury, courts must strictly comply with the ABA Standards Relating to Trial by Jury, Sec. 5.4, which are as follows:

   5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to

deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

The instruction contemplated in Sec. 5.4(a) may be given as a part of the main charge and should be given in the following form:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

> If given as a part of the main charge, it may be repeated should a deadlock develop. Variations from the aforementioned are not permitted. *Id.*

7. Furthermore, the case law in this state is clear that any inquiry into the numeric division of the jury is not the proper practice, and the jury's voluntary disclosure of its split can be coercive. *Williams v. United States* 338 F.2.d 530 (D.C. Cir 1964). The coercive effect of the jury's voluntary disclosure of a split may be compounded when the court knows which way the jury is split with regard to guilt or innocence. See, *United State* [sic] *v. Lash,* 937 F.2d 1077, 1086 (6th Cir. 1991).

8. When the foreman reported that the jury was "very lopsided", specifically identified a "dissenting party," and stated that "some people" could not convict without a smoking gun, it became apparent that a significant minority existed within the jury. This compounded the error of the trial court in failing to adhere to *Kersey*.

9. In Tennessee, the only permissive inquiry as to the progress of the jury is whether the jury believes it might reach a verdict after further deliberations. *Kersey v. State,* 525 S.W. 2d 139 (Tenn 1975). The Court went beyond any permissive inquiry in this matter by asking whether "there were others on the other side of the fence who had a strong opinion the other way."

10. The conduct that occurred during the initial questioning of the jury at 2:00 p.m. or thereabouts on March 11, 2009, in effect, coerced the jury into returning a verdict. Moreover, the defendant's right to trial by jury is and has been impaired and encumbered with conditions, which by practical application, may embarrass or violate the free and full enjoyment to a trial by jury. See, *Neely v. State* 63 Tenn 174 (1874).

11. More troublesome is the fact that the foreman of the jury reported later at 4:58 p.m. or thereabouts on March 11, 2009, "we intend to come in with a fair and unanimous verdict," which was clearly intended to inform the Court that the jury was coming around. This colloquially operated to embarrass, impair, and violate the defendant's Constitutional rights to a fair trial and to an independent trial by jury. The defendant's rights to a fair trial have undoubtedly been prejudiced as a result of the undo [sic] intrusion into the providence of the jury by the Trial Judge along with the obvious actions of the foreman of the jury in publicly identifying the "dissenting party" in an effort to coerce the minority into reaching a unanimous verdict. Courts should not condone the jury that comes into the courtroom and humiliates a juror who dissents in order to coerce that juror to join the majority. *Wright v. Richman,* 179 A. 2d 677, 679 (PA Super 1962). The place for resolving differences is in the jury room, and the majority cannot enlist the aid of the trial

judge in convincing those who do not agree with them. *Id.*

12. In effect, this trial is at a point where any single juror may be coerced into surrendering their consciously-entertained views, which thereby violates the jury's providence. The act of the foreman invaded the providence of the jury, thereby completely or partially diluting the requirement of unanimity. See, *Thomas v. State,* 748 SO. 2d 970 (Fla. 1999).

13. The exchange that occurred at 4:58 p.m. on March 11, 2009 or thereabouts, reflects an inherent inconsistency in the charge to the jury as a whole as it urged them to reconsider their verdict while simultaneously reminding them to make their decision based upon their opinion and without sacrificing their own convictions. Furthermore, the foreman's statement had the practical effect of asking the "dissenting party" to consider shifting his or her opinions because said opinions were contrary to those of the majority.

14. The foregoing problem was compounded by the fact that the Court pointed out that all of the proceedings were on national television. Clearly the foreman was cognizant of his presence on the national stage as he reminded the Court that defense counsel had said his name many times.

15. It is obvious the actions of the jury and the Court between 1:58 p.m. on March 11, 2009,

and thereafter, strongly suggested the "dissenting party" or minority should surrender their honest convictions as to the weight or effect of the evidence solely because of the majority opinion of the fellow jurors.

16. Moreover, the foreman of this jury demanded that the jury deliberate for an unreasonable length of time and for unreasonable intervals.

17. At all times during the afternoon of March 11, 2009, the jury was deadlocked.

18. The *Kersey* standard has been violated and the Court has departed and permitted the foreman to depart from strict adherence to the *Kersey* standards. *Kersey v. State,* 525 SW 2d 139 (Tenn. 1975). As a consequence thereof, the defendant has been and will continue to be prejudiced, and a mistrial is warranted.

19. The Court also failed to provide a written response to the jurors' question that he please instruct them as to what to do. The aforementioned practice has been condemned in civil cases where one's Constitutional rights are not as fiercely protected as in a criminal case. *Waters v. Cocker,* 229 S.W. 2d 682 (Tenn 2007).

20. The Court's failure to adequately admonish the foreman not to divulge the jury's numerical division, the foreman's voluntary divulgence of the existence of a lopsided split, and the Court's failure to advise the jury not to

abandon an honestly held conviction, compounds the coercive nature of this situation more than is permitted by law.

21. Finally, the fact that the jury had reported that it was unable to reach a unanimous verdict and the fact that this situation continued for several hours after approximately eight and a half to nine hours of deliberation, as aforesaid, cumulatively operate to create a coercive atmosphere, which has denied the defendant of a fair trial by a neutral and detached jury.

22. It is because of the aforesaid undo [sic] influence, singularly, commingled, and combined, that the defendant moves for a mistrial.

23. The defendant would further point out that the amount of information contained in the public domain is far more excessive than ever before, and the Court has commented that the actions of everyone in the courtroom are being broadcasted by national and local media. This commentary adds to the calamity of the present situation.

24. The Defendant and her counsel had no part in any of the foregoing and did not encourage the discussion of the aforesaid between the Court and the foreman.

Respectfully submitted this 12th day of March, 2009.

/s/ James A.H. Bell
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IN THE CRIMINAL COURT FOR THE SIXTH JUDICIAL DISTRICT KNOX COUNTY, TENNESSEE DIVISION I

STATE OF TENNESSEE, Plaintiff,	)	
v.	)	No. 85787
RAYNELLA DOSSETT LEATH, Defendant.	)	

MOTION TO DISMISS

Comes the defendant, Raynella Dossett-Leath, and moves the Court to dismiss the indictment charging the defendant with murder in the first degree in that the trial court failed to follow the procedure as set out in T.R.C.P. Rule 31(d)(2) – or in the alternative, dismissing all the charges against Ms. Leath with the exception of assault before the new trial commences – and/or combined with the defendant's Motion for Mistrial.

In this case, the defendant filed her Motion for Mistrial before the jury was ordered to return to deliberate a verdict. Said motion is incorporated herein by reference. The Court ordered a transcript and relative to the motion, and said transcript is attached as **Exhibit 1** hereto.

Rule 31(d)(2) states the following:

Procedures When No Unanimous Verdict. If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

> (i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.
>
> (ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

> (i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.
>
> (ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.
>
> (D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.
>
> (E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury."

This procedure in Rule 31 was not followed at all. By way of such motion, the defendant enters a plea of former jeopardy with regard to all Counts of the indictment by operation of law. In this case, the Court instructed the jury of the lesser included offenses, (see jury charge of the Court), which is traditional in practice, outlined and required by the pattern jury instructions, approved and adopted by the State of Tennessee and commonly referred to as "acquittal-first jury instructions".

In other words, the jury would acquit the Defendant on the count charged; then the jury would consider the next lesser included offense. This process would continue until the jury unanimously decided to convict Ms. Leath of one of the offenses or acquit

Ms. Leath of all of the offenses. The verdict forms prepared and submitted to the jury at the conclusion of the Court's charge provided the manner in which the jury could clearly report its verdict.

Rule 31(d)(2) seeks to protect a defendant who has previously been acquitted on greater offenses from again being tried on those offenses. The Advisory Commission Comments states:

> In some cases, the jury may acquit the defendant of the greater offense but be unable to reach a unanimous verdict on one or more lesser offenses. If the court grants a mistrial as to all offenses because of the jury's failure to reach agreement on a lesser offense, the double jeopardy clause is implicated if the jury actually acquitted the defendant of one or more fo [sic] the greater offenses but disagreed on a lesser one.

Tenn.R.Crim.P. 31 Advisory Commission Comment.

In this case, the Court failed to inquire if the jury was hung on *any* of the charges including the lesser included offenses. Thus, it is unknown whether Ms. Leath was acquitted of any or all of the greater offenses. In other words, we do not know at what point the jury "hung."

The jury deliberated for an extraordinary amount of time even after having been ordered to continue its deliberation after reporting that it could not reach a unanimous verdict. This Court found that the jury was deliberating carefully, had paid close attention to

the facts and instructions, and even ordered the jury to again review the jury instructions. The Court specifically found that the jury "was doing exactly what it was supposed to be doing." Obviously, the jury was well informed of the "acquittal first" instructions. Further, the jury had deliberated for quite a long time before first reporting that a unanimous verdict could not be reached and being ordered to continue to deliberations. Presumably, the jury was applying the law as instructed by the Court. As such, the jury was acquitting Ms. Leath on greater offenses before becoming hung on the verdict for the unknown offense.

If Ms. Leath is tried again for the conduct alleged in this indictment, Ms. Leath will be twice placed in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution and Article I § 10 of the Tennessee Constitution. Because Ms. Leath does not know the extent to which she was acquitted as a result of the failure to apply the procedure set forth in Tenn.Crim.P. 31(d), trying her again for any of the crimes that could be violated as a result of the conduct alleged in this indictment (with the exception of assault) would result in a violation of Ms. Leath's Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I § 8 of the Tennessee Constitution.

Accordingly, Ms. Leath requests that this Court issue an order dismissing the indictment against her; or in the alternative, dismiss all the charges against

Ms. Leath with the exception of assault before the new trial commences. Ms. Leath also renews her challenge raised in her motion for mistrial.

Respectfully submitted this 7th day of April, 2009.

/s/ James A.H. Bell
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IN THE CRIMINAL COURT
FOR KNOX COUNTY DIVISION I
AT KNOXVILLE, TENNESSEE

STATE OF TENNESSEE

VS. CASE NO. 85787

RAYNELLA DOSSETT LEATH

JURY CHARGE FROM SECOND TRIAL

FEBRUARY 19, 2010

* * *

[983] [THE COURT:] The defendant, Raynella Dossett Leath, is charged in the indictment 85787 with the offense of first-degree murder. The offense necessarily includes the lesser-included offenses of second-degree murder, voluntary manslaughter, aggravated assault, reckless homicide, criminally negligent homicide, and assault. Ms. Leath pleads not guilty to each and every offense embraced in the indictment.

The defendant is charged in the first count of the indictment with the offense of first-degree murder. Any person who commits the offense of first-degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant unlawfully killed David Leath; and number two, that the defendant acted intentionally. A person acts intentionally when it is the person's conscious objective or desire to cause the death of David Leath; and number three, that the killing was premeditated.

A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of [984] the accused for any definite period of time. The mental state of the accused at the time she allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill was first formed during the heat of passion, but the accused commits the act after the passion has subsided.

If you have a reasonable doubt as to the defendant's guilt of first-degree murder, as charged in the indictment, then your verdict must be not guilty as to this offense, and you shall proceed to determine her guilt or innocence of second-degree murder, a lesser-included offense. Any person who commits second-degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant unlawfully killed David Leath; and number two, that the defendant acted knowingly.

If you have a reasonable doubt as to the defendant's guilt of second-degree murder, a lesser-included offense, then [985] your verdict shall be not guilty as to this offense, and you shall proceed to determine her guilt or innocence of voluntary manslaughter, a lesser-included offense. Any person who commits voluntary manslaughter is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant unlawfully killed David Leath; and number two, that the defendant acted intentionally or knowingly; and number three, that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

If you have a reasonable doubt as to the defendant's guilt of voluntary manslaughter, a lesser-included offense, then your verdict must be not guilty as to this offense, and you shall proceed to determine their guilt or innocence of aggravated assault, a

lesser-included offense. Any person who commits the offense of aggravated assault is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant intentionally or knowingly caused serious bodily injury to David Leath; and [986] number two, that the defendant used or displayed a deadly weapon.

If you have a reasonable doubt as to the defendant's guilt of aggravated assault, a lesser-included offense, then your verdict must be not guilty as to this offense, and you should – and then you should proceed to determine their guilt or innocence of reckless homicide, a lesser-included offense. Any person who commits the offense of reckless homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant killed David Leath; and number two, that the defendant acted recklessly.

If you have a reasonable doubt as to the defendant's guilt of reckless homicide, a lesser-included of offense – offense, then your verdict must be not guilty as to this offense, and you shall proceed to determine

their guilt or innocence of criminally negligent homicide, a lesser-included offense. Any person who commits criminally negligent homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Number one, that the defendant's conduct resulted in [987] the death of David Leath; and number two, that the defendant acted with criminal negligence.

If you have a reasonable doubt as to the defendant's guilt of criminally negligent homicide, a lesser-included offense, then your verdict must be not guilty as to this offense, and you shall proceed to determine their guilt or innocence of assault, a lesser-included offense. Any person who commits an assault upon another is guilty of a crime.

* * *

[1140] THE COURT: No. I think I went further than this.

MR. BELL: You did. I think you went through the next three pages – four pages.

THE COURT: Yes, I did.

MR. BELL: Yeah. Where it says, "Now that the evidence" –

THE COURT: Yes. Yes. And then I went on to read the next four pages, including the alibi charge.

And you can take out that the defendant was not present when the crime was committed. You can take out –

SECRETARY: Okay.

MR. BELL: Your Honor, we would object to the alibi instruction as read because it reads as: An alibi is defined as evidence, which, if believed, would establish that the defendant was not present at the scene, dot, dot, dot.

I would ask the Court to change that to say that an alibi is defined as evidence which would cast doubt or reasonable doubt that the defendant was present at the scene of the crime when it allegedly occurred. If the defendant was not present when the crime was committed, she cannot be found guilty.

What that does, it shifts the burden of proof, and it puts a burden on us that the constitution forbids; that is, and I cite In Re: Winship requires us to prove an alibi that [1141] is to be believed as to whether the alibi creates a reasonable doubt, and so we would ask the Court to modify that language. I know that comes from the TPI, but those TPI are just suggested charges and not legislative mandates.

THE COURT: I believe that I'm comfortable with the language as it reads, Mr. Bell.

MR. BELL: Very well. We – for the record, your Honor, we would –

THE COURT: Very well.

MR. BELL: – object, and can that be continued so I don't have to renew it at the bench?

THE COURT: Of course, yeah.

MR. BELL: Yes, sir. Well, you never know what the appellate court's going to say. Well, they didn't – waive it. They didn't bring it back up later.

THE COURT: You've objected.

MR. BELL: Yes, sir.

THE COURT: I'm going to charge it as contained in the –

MR. BELL: And I didn't look for it, but where Raynella's not taken the stand to testify, you got in there the fact the defendant did not testify should not be considered in deliberations. Is that – that was in the last one, I think, and it's – okay. Good.

* * *

[1150] [THE COURT:] I, ladies and gentlemen, is you-all have a copy of these – these instructions. The way that we do it is I'm going to read to you the specific charges, the charged offense of first-degree murder and the lesser-included offenses that necessarily go with that charged offense, and a little bit more, and then I'm going to stop, let these lawyers argue why they think the state has or has not met its

burden of proof, and then after they've made their closing remarks to you, I will conclude with some general principles of law and evidence that apply to this case and all criminal cases in their entirety. So if you would, please follow along with me as I read these – this charge to you.

(The Court read the charge to the jury regarding the specific elements.)

THE COURT: All right. Ladies and gentlemen, I'm going to stop at this point and let – let me read one more thing, and that is this alibi.

(The Court read the alibi portion of charge to the jury.)

THE COURT: Very well. Ladies and gentlemen, at this point I'm going to stop and let these lawyers make their closing arguments to you. Again, remember these are not – this is not evidence, but I encourage you to listen closely to what they've got to say. They've worked on this case long and hard, and they've put a lot of time in this case. So – the [1151] state's got the burden of proof. They get to address you first and last. Mr. Bell and Ms. Ham will have the opportunity to address you in between.

So, Mr. Fisher, you have the floor, sir.

MR. FISHER: Thank you, your Honor.

(Closing arguments were made on behalf of the state and on behalf of the defense.)

THE COURT: Very well, ladies and gentlemen. If you'll turn back with me now to page 15 of the instructions, we'll finish reading these instructions.

(The Court read the remainder of the charge to the jury.)

THE COURT: Lastly, ladies and gentlemen, there is a verdict form. You all have a verdict form. Only the foreperson actually need to fill out this verdict form and sign it and turn it in, and of course, I'm going to ask the verdict – the foreperson to read the verdict when it's – when it's delivered by the – by the foreperson, but you all have one to follow along when you do that. I think it's pretty self-explanatory. You start with the first – with the charge in the indictment; that is, first-degree murder. You are instructed that you have to reach a verdict on that – on the charged offense of first-degree murder before you go on to consider any lesser-included offenses.

* * *

IN THE CRIMINAL COURT
FOR KNOX COUNTY DIVISION I
AT KNOXVILLE, TENNESSEE

STATE OF TENNESSEE

VS. CASE NO. 85787

RAYNELLA DOSSETT LEATH

JURY INSTRUCTIONS ON ALIBI

FEBRUARY 19, 2010

* * *

The defendant has presented evidence of an alibi in this case.

An alibi is defined as evidence which, if believed, would establish that the defendant was not present at the scene of the alleged crime when it allegedly occurred. If the defendant was not present when the crime was committed, she cannot be guilty.

The burden is on the state to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed. If you find from your consideration of all the evidence that the state has failed to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed, you must find the defendant not guilty.