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Special Comment

Self-Defense in Kentucky: A Need for Clarification or Revision

BY WILLIAM S. COOPER* AND ROBERT G. LAWSON**

1

On August 3, 1985, a quarrel developed between Gerald Miller and his wife—a dispute which surfaced near the end of Miller's two-day drunken binge.¹ This quarrel occurred on Floyd Butler's property. Butler was present and got caught in the argument. Miller was a "thirty-three-year-old muscled-up man";² Butler was fifty-seven years old and relatively frail. The two men had been neighbors and good friends for several years. At some point during the quarrel, however, Miller became angry with his friend and threatened Butler with bodily harm. He had no weapon on his person, made no effort to carry out the threat, and left the Butler property without further incident.

Later in the day, ostensibly to apologize for his previous conduct, Miller returned to the scene of the earlier threat. During Miller's absence, Butler obtained a .22 rifle, loaded it with shells, and had it handy. Upon arrival, Miller got out of his car, offered to apologize, and extended his hand. Butler grabbed the loaded rifle and instructed Miller to come no closer. With his hand

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¹ The facts of this narrative derive from the recollection and notes of Judge Cooper, the presiding judge of the *Butler* trial. *Commonwealth v. Butler*, No. 85-CR-68 (Cir. Ct. Hardin County, Ky. Feb. 20, 1986) (judgment upon jury verdict without written opinion).

Judge Cooper recorded this statement in his notes from the trial testimony of Floyd Butler.

extended, Miller took two steps forward. Butler shot Miller three times—twice in the chest and once in the back. In a subsequent trial for murder,³ Butler said two important things about his actions: (i) he believed that Miller meant to beat or shoot him with the gun, and (ii) he intended only to stop Miller by shooting him in the legs and did not intend to kill him.

The circumstances of this homicide combine with Butler's testimony to present a very complicated legal problem. The complexity results not so much from the intricacies of the law of homicide and self-defense but rather from the need to extract the factual truth from a multitude of possibilities. Did Butler intend to kill Miller (as the circumstances indicate) or did he lack such an intent (as he asserted in his testimony)? If Butler lacked the intent to kill, did he intend to cause serious bodily injury to Miller? If Butler lacked the intent to kill or the intent to cause serious bodily injury, did he consciously disregard an unreasonable risk of causing death when he took action against Miller? Did he fail to perceive an unreasonable risk of death under circumstances constituting a gross deviation from the standard of conduct of a reasonable person? Did Butler really believe he was at risk of death or serious bodily injury at Miller's hands? Did he believe that killing or seriously injuring Miller was necessary to protect his own life or limb? Did he act under a mistaken belief in the need to protect himself? Did he consciously disregard a substantial risk that he was mistaken in his belief in the need for self-protection? Did Butler fail to perceive a substantial risk that he was mistaken in his belief?

The multitude of possible factual truths creates a complexity that is inherent in homicide and self-defense cases. Butler's assertion that he did not intend to kill Miller creates a need for jury instructions on every homicide offense in the law. His assertion that he acted in self-defense adds a layer of difficulty to the case, and the possibility that he acted under a mistaken belief in the need for self-protection further complicates the issues. Because this complexity is inherent in the justice system, there exists no way to convert cases such as this into elementary exercises for juries. Because of its magnitude, the system has little capacity to absorb unnecessary complexity or to tolerate much conceptual confusion.

³ Butler, No. 85-CR-68.

The Butler trial, which occurred in January of 1986, leaves no doubt that Kentucky has pushed the system beyond the limit of its tolerance for complexity and confusion. It also leaves no doubt that there exists a critical need to clarify or to revise the Kentucky law of self-defense. A demonstration of this need and a description of its nature are the principal objectives of this Special Comment. To accomplish these objectives, it is necessary to provide some information about the recent history of homicide and self-defense in Kentucky and to describe some important recent interpretations of this law by the Supreme Court of Kentucky. Only with this information as background can one appreciate the significance of Floyd Butler's trial.

2

Prior to 1962, Kentucky had two general categories⁴ of statutory homicide: murder⁵ and voluntary manslaughter.⁶ The applicable statutes provided only a range of penalties and deferred to the common law for the definition of each crime. Murder was a homicide committed intentionally and with malice;⁷ voluntary manslaughter was an intentional killing "in a sudden affray or in [a] sudden heat and passion."⁸ At this time, the offense of involuntary manslaughter existed entirely as a common-law crime that was punishable only as a misdemeanor.⁹ This third general homicide category was an unintentional killing either resulting from carelessness or during the commission of an unlawful act.¹⁰

In 1962, the Kentucky General Assembly converted common-

⁴ Other categories defining specific types of homicide existed. *E.g.*, KY. REV. STAT. § 435.025 (1959) (vehicular homicide); *id.* at § 435.030 (homicide occurring in the course of criminal syndicalism or sedition); *id.* at § 435.040 (homicide occurring in the course of an abortion); *id.* at § 435.050 (homicide occurring in the course of a striking, a stabbing, or a shooting); *id.* at § 435.060 (homicide or injury resulting from the obstruction of a road).

⁵ *Id.* at § 435.010.

⁶ *Id.* at § 435.020.

⁷ See 3 O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY § 868 (1957).

⁸ Commonwealth v. Mosser, 118 S.W. 915, 915 (Ky. 1909).

⁹ See KY. REV. STAT. § 431.075 (1959) ("Any person convicted of a common-law offense, the penalty for which is not otherwise provided by statute shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.')

¹⁰ See Spriggs v. Commonwealth, 68 S.W. 1087 (Ky. 1902); Trimble v. Commonwealth, 78 Ky. 176 (1879).

law involuntary manslaughter into a statutory crime¹¹ creating two degrees of the offense. Involuntary manslaughter in the first degree was a felony defined as an unintentional killing caused "by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances."¹² Involuntary manslaughter in the second degree was a misdemeanor defined as an unintentional killing caused "by reckless conduct according to the standard of conduct of a reasonable man under the circumstances."¹³ The 1962 enactment left the other two general homicide offenses intact, resolved some confusion about the scope of involuntary manslaughter as it had existed at common law,¹⁴ and removed simple negligence from the realm of criminal culpability for homicide.¹⁵

Unlike homicide, the Kentucky law of self-defense took shape in the early days of common law and changed very little thereafter. Under this law, a defendant charged with homicide was entitled to exoneration upon a showing that (1) he believed that the conduct of the victim posed an imminent threat of death or of serious bodily injury to him; (2) he believed that use of deadly physical force was necessary to avert that threat; and (3) he had reasonable grounds to entertain the beliefs that compelled him

¹¹ KY. REV. STAT. ANN. § 435.022 (Bobbs-Merrill 1970) [hereinafter KRS] (codified the 1962 Act), *repealed by* An Act Relating to the Kentucky Penal Code, ch. 406, § 336, 1974 Ky. Acts 889.

¹² *Id.* at § 435.022(1).

¹³ *Id.* at § 435.022(2).

¹⁴ See *Jones v. Commonwealth*, 281 S.W. 164 (Ky. 1926), *overruled on other grounds*, *Marye v. Commonwealth*, 240 S.W.2d 852, 855-56 (Ky. 1951). "[T]o constitute involuntary manslaughter at common law, a person who kills another while engaged in the performance of a lawful act, must be guilty of *gross negligence*. . . ." *Id.* at 167 (emphasis added); cf. *Montgomery v. Commonwealth*, 81 S.W. 264 (Ky. 1904).

It is essential to the commission of voluntary manslaughter that the homicide should have been willfully and intentionally committed, or [should have been committed] under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator.

Id. at 265, *quoted in* *Hawpe v. Commonwealth*, 27 S.W.2d 394, 396 (Ky. 1930); *Jones*, 281 S.W. at 166.

¹⁵ See *Hemphill v. Commonwealth*, 379 S.W.2d 223 (Ky. 1964). "KRS 435.022 specifically removes from the framework of [in]voluntary manslaughter those homicides resulting from negligence; therefore, the new statute makes inapplicable the cases equating negligent homicide with [in]voluntary manslaughter, no matter how gross the negli-

to act. All three of these elements had to exist for an accused to be acquitted of homicide on the basis of self-defense. Proof of the first two elements but not the third entitled an accused to no dispensation under the law, even though a jury might have thought that he acted under an honest belief in the need for self-protection.¹⁶

This was the state of homicide and self-defense law in 1974 when the Kentucky General Assembly undertook to adopt a modern penal code. Substantial change in the law, particularly the law of self-defense, was on the horizon. This change came in 1975 on the effective date of the new Kentucky Penal Code.¹⁷

3

The Kentucky Penal Code¹⁸ specifically abolished all common law offenses,¹⁹ defined each crime fully and precisely, and established penalty ranges for all defined offenses.²⁰ It created four separate crimes of homicide.

A person commits *murder* when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . . ;
or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates

gence." *Id.* at 226. *But see* KRS § 435.025 (1970) (the misdemeanor offense of homicide by negligent operation of a motor vehicle, sometimes referred to as "negligent homicide." *Casey v. Commonwealth*, 313 S.W.2d 276, 278 (Ky. 1958)).

¹⁶ *See, e.g.,* *Brown v. Commonwealth*, 214 S.W.2d 1018 (Ky. 1948); *Farley v. Commonwealth*, 145 S.W.2d 100 (Ky. 1940); *Ferguson v. Commonwealth*, 34 S.W.2d 959 (Ky. 1931).

¹⁷ Ch. 406, § 1, 1974 Ky. Acts 831 (codified at KRS § 500.010 (1975)) (effective Jan. 1, 1975).

¹⁸ *Id.*

¹⁹ *See* KRS § 500.020(1) (1975). Unless indicated otherwise, all KRS citations *infra* refer to the 1975 replacement.

²⁰ *See id.* at §§ 532.030, 532.060, 532.090.

a grave risk of death to another person and thereby causes the death of another person.²¹

A person "intentionally" causes death when he has that result as "his conscious objective."²² A person "wantonly" causes death when he "consciously disregards a substantial and [an] unjustifiable risk" of death to another that "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."²³ The penalty for murder is death²⁴ or imprisonment for "not less than twenty (20) years."²⁵

A person commits *manslaughter in the first degree* when:

(a) With intent to cause serious physical injury [but not death] to another person, he causes the death of such person or of a third person; or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance. . . .²⁶

The penalty for this offense is imprisonment for "not less than ten (10) years nor more than twenty (20) years."²⁷

Under the Code, "[a] person is guilty of *manslaughter in the second degree* when he wantonly causes the death of another

²¹ KRS § 507.020(1). Extreme emotional disturbance replaced the common law concept of "heat of passion." The common law required "adequate provocation in the eyes of a reasonable man under the circumstances," *Wellman v. Commonwealth*, 694 S.W.2d 696, 697 (Ky. 1985), while the Code "requires the jury 'to place themselves in [the defendant's] position as he believed it to be at the time of the act.'" *Id.* (quoting *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980) (emphasis in original), *overruled on other grounds*, *Payne v. Commonwealth*, 623 S.W.2d 867, 870 (Ky. 1981)). For a definition of extreme emotional disturbance, see *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986), *cert. denied*, 107 S. Ct. 935 (1987).

²² KRS § 501.020(1).

²³ *Id.* at § 501.020(3). One can commit wanton murder under circumstances which would have constituted only involuntary manslaughter in the first degree under the common law. See *supra* text accompanying note 12. Wanton murder also replaces the common law concept of felony murder. See *Kruse v. Commonwealth*, 704 S.W.2d 192 (Ky. 1985). Felony murder was an intentional crime: the intent to commit a separate felony resulting in a killing supplied "the elements of malice and intent" necessary to constitute murder. *Simpson v. Commonwealth*, 170 S.W.2d 869, 869 (Ky. 1943).

²⁴ KRS at § 532.030(1); see also *id.* at § 507.020(2) (situations when murder is a capital offense).

²⁵ See *id.* at § 532.060(2)(a).

²⁶ *Id.* at § 507.030(1).

²⁷ *Id.* at § 532.060(2)(b).

person.”²⁸ The penalty for this offense is imprisonment for “not less than five (5) years nor more than ten (10) years.”²⁹

“A person is guilty of *reckless homicide* when, with recklessness he causes the death of another person.”³⁰ A person “recklessly” causes death “when he fails to perceive a substantial and [an] unjustifiable risk” of death to another that “constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”³¹ The penalty for reckless homicide is imprisonment for “not less than one (1) year nor more than five (5) years.”³²

In dealing with criminal law defenses, the Penal Code used an approach entirely new to Kentucky law; the legislature undertook to identify and define fully all the circumstances that a defendant could present as justification or excuse for criminal conduct. In the area of self-defense, this new approach produced two very important statutes.

The first one, Kentucky Revised Statutes (hereinafter KRS) section 503.050, provides a basic definition of the defense of self-protection:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.³³

It should be noted that neither section of this statute makes any reference to the reasonableness of a defendant's belief in the need for self-protection, an important element of the law of self-defense prior to the adoption of the Code.³⁴

²⁸ *Id.* at § 507.040(1) (emphasis added); see *supra* text accompanying note 23 (“wantonly” causing death).

²⁹ KRS § 532.060(2)(c).

³⁰ *Id.* at § 507.050(1) (emphasis added).

³¹ *Id.* at § 501.020(4).

³² *Id.* at § 532.060(2)(d).

³³ *Id.* at § 503.050.

³⁴ See *supra* note 16 and accompanying text.

The second important statute, KRS section 503.120(1), states:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.³⁵

It should be noted that this statute speaks in terms of “wantonness” and “recklessness” of a defendant’s *belief* and not in terms of “wantonness” and “recklessness” of a defendant’s *conduct* toward a victim.

4

To say that KRS sections 503.050 and 503.120(1) have been a source of difficulty and confusion for Kentucky courts is a gross understatement.³⁶ In addressing this difficulty and confusion, it is necessary first of all to focus on the legislative history of these provisions, much of which exists without historical documentation.³⁷ In proposing the provisions that ultimately became KRS sections 503.050 and 503.120, the drafters of the Penal Code tried to provide more than a mere definition of self-defense. They also attempted to address a problem involving the classification for purposes of penalty of at least five types of homicide.³⁸

Under the *first* type of homicide, the offender intends to kill, and he acts without any semblance of justification, excuse, or mitigation. Common law called this culpability “malice aforethought” and labeled the homicide as murder. Modern codes do not use the term “malice aforethought” to describe this

³⁵ KRS § 503.120(1).

³⁶ See *infra* notes 55-81 and accompanying text.

³⁷ Dean Lawson was the principal drafter of the Kentucky Penal Code. The following textual material derives from his thoughts and his recollections as a drafter.

³⁸ The authors classify homicide for illustrative purposes.

culpability, but they do label a killing of this type as murder, and treat it as the law's most reprehensible homicide.

The *second* type of homicide offender intends to kill, but he acts under circumstances that provide a measure of mitigation or extenuation (but not justification or excuse) for his conduct. He is less culpable than the *first* type and suffers lesser penalties upon conviction. This *second* type of homicide was voluntary manslaughter under the common law.

The *third* type of homicide involves an actor who intends to kill, but he acts under a threat of death or serious bodily injury that is either real or so apparently real that no prudent person would fail to act in self-protection. The killing may be an unnecessary act of self-defense, but nothing in the circumstances indicates that a reasonably prudent person should refrain from acting. The actor in this instance is free of criminal culpability; his killing is commonly called justifiable homicide.

Under the *fourth* type of homicide, the offender intends to kill, but he acts under a threat of death or serious bodily injury that is both erroneously perceived and so imprudently held that no reasonably cautious person would act in self-protection. The culpability of the offender is contained in the risk of unnecessary killing which he either consciously disregards or fails to perceive.

The *fifth* type of homicide offender does not intend to kill, but he acts under circumstances generating an unreasonable risk of death to another that either he fails to perceive or he consciously disregards. A typical offender of this type causes death through gross misconduct in the operation of a motor vehicle or in the use of a lethal weapon. The law has described the culpability of this offender with various labels, *e.g.*, "wantonness," "recklessness," and "criminal negligence," and has treated his conduct as one or more types of involuntary manslaughter.

The primary concern of the Penal Code drafters, as they worked to formulate provisions on self-defense, centered around the treatment of homicides committed as a result of erroneous and flawed beliefs in the need for self-protection, the *fourth* type of homicide. Due to the way pre-Code law defined self-defense,³⁹ these homicides had the same penalty as those in which the offender lacked any semblance of justification or excuse, the

³⁹ See *supra* note 16 and accompanying text.

first type described above. Doubts about the fairness of this grouping generated many questions. What degree of culpability is involved in a killing that results from an unreasonable belief in the need for self-protection? Is the essence of the defendant's guilt in such a killing closely akin to the essence of guilt contained in conduct that creates an unreasonable and an unacceptable risk of harm to others? Is the moral guilt in such a killing equivalent to the moral guilt of the most reprehensible of crimes?

In addressing these questions, particularly the last, the drafters of the Code came firmly to believe that a wide difference exists in the moral blameworthiness of *first*-type offenders and *fourth*-type offenders. The motivation and the driving force for change in the definition of self-defense derived from this conviction.⁴⁰ The drafters decided to eliminate the possibility of a murder conviction when the offender has an honest but an unreasonable belief in the need for self-protection. This decision was not difficult to reach, for one can easily see that the culpability of the *fourth* type of homicide is lower in degree than the culpability of murder. Once this decision was made, however, the drafters of the Code addressed a question of much greater difficulty. What is an appropriate penalty classification for the *fourth* type of homicide since a murder conviction no longer would be possible?

The drafters considered two approaches in addressing this question, each with some support in the law of other jurisdictions. The first approach treats a homicide resulting from an honest but an unreasonable belief in the need for self-protection as a form of voluntary manslaughter,⁴¹ an offense that the law has traditionally reserved for intentional homicides committed under the extenuating circumstance of passion induced by rea-

⁴⁰ The same kind of grouping problem existed with respect to the other defenses of justification, e.g., defense of property, defense of others, and defense of habitation. Since these other defenses come into play fairly infrequently, the defense of self-protection was at the focus of attention in the drafting of the new Code. Nevertheless, the proposed and the adopted adjustment for self-defense applies to all the defenses of justification that the Code recognizes.

⁴¹ See, e.g., *State v. Thomas*, 114 S.W. 834, 837 (N.C. 1922); *Commonwealth v. Colandro*, 80 A. 571, 574 (Pa. 1911); see also W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 665-66 (2d ed. 1986).

sonable provocation.⁴² To group the *fourth* type of homicide with traditional voluntary manslaughter, one must conclude that the extenuation of a mistaken belief in the need for self-protection is roughly equivalent to the extenuation of passion induced by provocation. Only a few authorities have accepted this conclusion, using the label of "imperfect self-defense" for the extenuating circumstance of mistaken belief.⁴³

The second approach treats a homicide resulting from an honest but unreasonable belief in personal danger as a form of criminal negligence or recklessness even though this *fourth*-type offender intends the consequences of his act. This approach equates the *fourth* type of homicide with the *fifth* type (the offender who kills unintentionally through conduct that entails an unreasonable and an unacceptable risk of death to others). The American Law Institute, via the Model Penal Code, is the strongest proponent of this second approach.⁴⁴

The drafters of the Kentucky Penal Code found the logic of the second approach compelling: one who mistakenly kills under an honest but imprudently held belief in the need for self-protection is no more culpable than one who inadvertently kills as a result of gross carelessness in the operation of a motor vehicle⁴⁵ or the use of a gun. Moreover, the drafters believed that the penalties under Kentucky's new Penal Code for an offense like traditional voluntary manslaughter⁴⁶ would be too harsh for the culpability involved in a killing resulting from "imperfect self-defense." These two beliefs led the drafters to provide a definition of self-defense which would leave *fourth*-type offenders and *fifth*-type offenders grouped together in a single category for purposes of penalty.

The method used in the new Code to accomplish this objec-

⁴² For many years, nearly every jurisdiction defined the extenuation as "heat of passion" upon "adequate provocation." See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 84-85 (3d ed. 1982). Many of the modern codes define it as "extreme emotional disturbance for which there was a reasonable explanation or excuse." *E.g.*, KRS § 507.020(a).

⁴³ See generally W. LAFAVE & A. SCOTT, *supra* note 41, at 665-66.

⁴⁴ See MODEL PENAL CODE § 210.3 (1962).

⁴⁵ See *supra* note 15.

⁴⁶ The old voluntary manslaughter crime, see *supra* note 8 and accompanying text, became manslaughter in the first degree under the new Code. KRS § 507.030; see *supra* notes 26-27 and accompanying text.

tive totally changed the definition of self-defense.⁴⁷ In lieu of the objective approach of the old law (in which reasonableness of a defendant's belief was an element of the defense),⁴⁸ KRS section 503.050 defines self-defense in purely subjective terms; self-defense depends solely on a defendant's subjective belief in the need for self-protection.⁴⁹ In amelioration of the impact of this change, however, KRS section 503.120(1) denies the defense of self-protection to a defendant who wantonly or recklessly forms his belief in the need for self-defense or who wantonly or recklessly acquires or fails to acquire knowledge pertinent to his belief.⁵⁰ The impact of KRS section 503.120(1) is limited, however, since it authorizes conviction only for offenses with wantonness or recklessness as the culpable state of mind.⁵¹

The intention of the drafters, in making adjustments to the old law, was clearly stated in the Official Commentary to the new Penal Code:

In eliminating the requirement that a defendant's belief and action be *reasonable* for the defense of self-protection, this chapter does not necessarily relieve him of all criminal liability for action based on unreasonable belief. If a defendant is mistaken in his belief as to the necessity of using force, KRS 503.050 provides him with a defense to all offenses having "intentional" as the culpable mental state, no matter how unreasonable his belief. At the same time, if he is "wanton" or "reckless" in having such a belief, it is possible because of

⁴⁷ Although this Special Comment focuses on the defense of self-defense, the drafters made identical changes to all the justification defenses. *See, e.g.*, KRS at § 503.070 (protection of another). Also, note that KRS § 503.120(1) applies to all the justification defenses.

⁴⁸ *See supra* note 16 and accompanying text.

⁴⁹ KRS § 503.050; *see supra* text accompanying notes 33-34.

⁵⁰ KRS § 503.120(1); *see supra* text accompanying note 35.

⁵¹ The wantonness and the recklessness limitations of KRS section 503.120 are not very restrictive. Self-defense involves using force against another that could cause death, bodily injury, or neither death nor injury. In all three instances, a qualifying offense exists that requires only a wanton or a reckless state of mind. If death results, a homicide conviction is possible. *See* KRS § 507.040 (manslaughter in the second degree); *supra* text accompanying notes 28-29; KRS § 507.050 (reckless homicide); *supra* text accompanying notes 30-32. If bodily injury results, the defendant may face an assault conviction. *See* KRS § 508.030 (assault in the third degree) (currently codified as assault in the fourth degree). If neither death nor bodily injury results, a wanton endangerment conviction is possible. *See id.* at § 508.060 (wanton endangerment in the first degree); *id.* at § 508.070 (wanton endangerment in the second degree).

KRS 503.120 to convict him of an offense having "wantonness" or "recklessness" as the culpable mental state. . . . As a consequence of the relationship between KRS 503.050 and 503.120, a person who kills another under a mistaken belief that his action is necessary for his own protection cannot be convicted of *intentional* murder but can be convicted of manslaughter in the second degree or reckless homicide if his mistaken conduct is sufficient to constitute "wantonness" or "recklessness."⁵²

The drafters' objective was simply to remove killings based on imperfect claims of self-defense from murder and place them in categories of homicide more commensurate with the culpability involved in a killing under a mistaken belief in the need for self-protection. The drafters did not intend to change the substance or operation of the law of self-defense in any other respect.⁵³

5

The first important case to appear before the Kentucky Supreme Court after the enactment of the new self-defense law was *Blake v. Commonwealth*.⁵⁴ The facts of the case present a typical set of self-defense circumstances. Evidence of a prior altercation in which the defendant threatened to kill the victim existed. On the night of the killing the victim was working at a business establishment noted for bootlegging activity. The defendant drove through a drive-in window at this facility, fired a pistol shot in the direction of the victim, and caused his death.

At trial, the defendant testified that he thought the victim was reaching for a shotgun or a rifle. No gun was found at the scene but according to evidence introduced at trial, "[i]t was generally known that the occupants of this establishment kept a shotgun just inside the window, and [the defendant] was aware of this."⁵⁵ The defendant attempted to take advantage of the new self-defense provisions by requesting that the jury be instructed to find him guilty of manslaughter in the second degree or reckless homicide if it believed from the evidence that he had killed under a wanton or a reckless belief in the need for self-

⁵² KRS § 503.050 1974 commentary (Baldwin 1984).

⁵³ See *supra* note 37.

⁵⁴ 607 S.W.2d 422 (Ky. 1980).

⁵⁵ *Id.* at 423.

protection. The trial judge denied his request;⁵⁶ the jury rejected his claim of self-defense and convicted him of manslaughter in the first degree. The Kentucky Court of Appeals affirmed.⁵⁷

The Kentucky Supreme Court reversed the conviction, holding that under appropriate facts the trial judge should instruct the jury that a defendant can be convicted of manslaughter in the second degree or reckless homicide if he was wanton or reckless in acquiring a belief that the use of deadly physical force was necessary for self-protection.⁵⁸ The facts of *Blake* qualified as appropriate; KRS section 503.120(1) entitled the defendant to the instruction. The supreme court quoted a part of the Commentary to the Penal Code⁵⁹ and cited with approval a suggested instruction from the leading authority on jury instructions for Kentucky courts.⁶⁰ The *Blake* decision was completely routine and unsurprising.

The surprise came four years later in *Baker v. Commonwealth*.⁶¹ At trial, the defendant presented barely a shred of evidence to support his claim of self-defense. The defendant, after a stormy marriage, killed his wife in a bar by shooting her in the back six times with a handgun. The only evidence even remotely probative of a self-defense claim was testimony that the victim kept a gun in her purse, kept her purse at the bar, and began running toward the bar just as the defendant began

⁵⁶ *Id.*

⁵⁷ *Id.* at 422.

⁵⁸ *Id.* at 423-24.

⁵⁹ *Id.* (quoting KRS § 503.050 commentary (1974)); see *supra* note 52 and accompanying text.

⁶⁰ See 1 J. PALMORE & R. LAWSON, INSTRUCTIONS TO JURIES IN KENTUCKY § 10.26 (1975):

Regardless of what the defendant then believed, if you believe from the evidence beyond a reasonable doubt the following:

(a) That it was not in fact necessary for him to use any physical force against X in order to protect himself or, if it was, he used more than was actually necessary;

AND

(b) That his belief to the contrary and the action he took against X in reliance upon that belief amounted to:

(i) Reckless conduct, then he was not so privileged, and you will find him guilty [of reckless homicide] . . . ;

OR

(ii) Wanton conduct, then he was not so privileged, and you will find him guilty [of second-degree manslaughter]

⁶¹ 677 S.W.2d 876 (Ky. 1984).

shooting. Notwithstanding the lack of genuinely probative evidence, the trial judge instructed the jury on the defense of self-protection under KRS section 503.050.⁶² He refused, however, to give an instruction on reckless homicide requested by the defendant under the authority of KRS section 503.120(1) on the theory of a mistaken belief in the need for self-protection.⁶³ The jury rejected the defendant's claim of self-defense and convicted him of murder. On appeal, his sole claim for reversal was the trial judge's refusal to give a reckless homicide instruction under the authority of KRS section 503.120(1).⁶⁴

Why the Kentucky Supreme Court let *Baker* become a major self-defense case is somewhat of a mystery. The trial judge was exceedingly generous in giving a jury instruction on self-protection; no more than a bare scintilla of credible evidence existed to support the claim. The instruction on self-defense called for acquittal of murder if the defendant had a simple belief in the need for self-protection at the time of the killing, no matter how unreasonable his belief might have been. Since the jury convicted the defendant of murder, it must have found that he had no belief at all in the need for self-defense. Under these circumstances, the supreme court could have found that the failure to give the added instruction on self-defense was not error or that any error resulting from such a failure was harmless. Rather than following the easy path, the court chose instead to use *Baker* as a vehicle to correct what was perceived as an erroneous interpretation of the new law on self-defense.

The court provided a lengthy analysis of self-defense and its relationship to homicide, reviewed the earlier *Blake* decision, and affirmed the conviction of Baker for murder.⁶⁵ More importantly, it repudiated its previous interpretation of KRS section 503.120(1), overruled *Blake*, and held that jury instructions on reckless homicide and manslaughter in the second degree are not proper when based on evidence that the accused killed under an unreasonable belief in the need for self-protection.⁶⁶ Simply stated, the court seemed to reason as follows: Self-defense is an inten-

⁶² *Id.* at 878.

⁶³ *Id.* at 879.

⁶⁴ *Id.* at 878.

⁶⁵ *Id.*

⁶⁶ *Id.* at 879.

tional act; manslaughter in the second degree and reckless homicide are unintentional crimes. An intentional act cannot be the basis for conviction of an unintentional crime. The court discussed the language of KRS section 503.120(1) and the Commentary to the Penal Code at length; in the end, however, the court concluded that "[t]he general assembly did not provide . . . for the inclusion of an intentional offense within the definition of reckless homicide."⁶⁷

In *Baker*, the court sustained a ruling denying a defendant's request under KRS section 503.120(1) for instructions on the lower degrees of homicide. The court indicated, however, that its interpretation of the statute would also apply when a trial court gives such instructions over the defendant's objection.⁶⁸ An opportunity for the court to turn this statement of dictum into a holding was not long in coming. Less than a year later, the Kentucky Supreme Court decided *Gray v. Commonwealth*.⁶⁹

The homicide in *Gray* occurred in the defendant's home during a party in which everyone in attendance was drinking. At the trial, no question existed over whether the defendant killed the victim or whether the defendant intended to shoot the victim. The defendant claimed self-defense in his testimony "because the victim was in the process of drawing a gun on him at the time."⁷⁰ The *Gray* trial occurred after the *Blake* decision but before the *Baker* decision. The trial judge instructed the jury on second-degree manslaughter and reckless homicide (in addition to murder) on the authority of KRS section 503.120(1) and the *Blake* decision; the defendant objected to the instructions on the lesser offenses. The jury found the defendant guilty of second-degree manslaughter, presumably on the basis of a determination that he had killed under a wanton belief in the need to use deadly force for self-protection. The Kentucky Court of Appeals reviewed the defendant's conviction before the *Baker* decision and affirmed on the basis of *Blake*.⁷¹ Upon review, the Kentucky Supreme Court repeated much of its *Baker* analysis and reversed

⁶⁷ *Id.*

⁶⁸ *Id.* at 880.

⁶⁹ 695 S.W.2d 860 (Ky. 1985).

⁷⁰ *Id.* at 861.

⁷¹ *Id.*

the conviction. The following statement summarizes the court's thoughts fairly well:

These instructions were erroneous for the reason that they permitted the jury to find movant guilty of second-degree manslaughter if his belief in the necessity to use deadly force to protect himself was unreasonable. As we held in *Baker v. Commonwealth* . . . , an unreasonable belief concerning the necessity of self-defense is not a factor in the statutory definition of second-degree manslaughter. To constitute second-degree manslaughter a person must be guilty of wanton conduct, he must act without intention to kill. . . .⁷²

6

The defendant Gray was never retried following the Kentucky Supreme Court's reversal of his conviction. In accordance with the United States Supreme Court's ruling that a retrial for the primary offense after a reversal of a conviction for a lesser included offense constitutes double jeopardy,⁷³ the defendant was released from bond and set free.⁷⁴ In two other homicide cases resolved on the basis of *Baker* and *Gray*, the end result was identical: the defendants were released without retrials on the merits.⁷⁵ In these two cases, the defendants relied on self-defense as "battered wives." Following convictions for manslaughter in the second degree, the Kentucky Court of Appeals reversed because no evidence indicated that the killings were unintentional.⁷⁶ With double jeopardy barring a retrial on charges of murder or manslaughter in the first degree, the defendant in each case walked free. The results in these cases, compelled by the ruling in *Baker*, could easily cause one to believe that the ends of justice were defeated. At the very least, these cases underscore the significance of the issue that this Special Comment addresses.

⁷² *Id.* at 862.

⁷³ See *Price v. Georgia*, 398 U.S. 323 (1970).

⁷⁴ *Commonwealth v. Gray*, No. 82-CR-001 (Cir. Ct. Lee County, Ky. review Oct. 18, 1985).

⁷⁵ *Commonwealth v. Ford*, No. 85-CR-072 (Cir. Ct. Fayette County, Ky. acquittal Jan. 13, 1987); *Commonwealth v. Lafollette*, No. 83-CR-001 (Cir. Ct. Larue County, Ky. acquittal April 7, 1986).

⁷⁶ *Ford v. Commonwealth*, 720 S.W.2d 735 (Ky. Ct. App. 1986); *Lafollette v. Commonwealth*, No. 84-CA-563-MR (Ky. Ct. App. Aug. 9, 1985) (unpublished opinion).

Determining the full impact of *Baker* and *Gray* on the defense of self-protection as defined in the Penal Code is difficult because the Kentucky Supreme Court's interpretation of what KRS section 503.120(1) *does not say* as well as what the statute *does say* is unclear. One can interpret *Baker* and *Gray* in at least two ways, neither of which leaves the law in a rational posture.

The only provision in the Code that *gives* an accused a basis for claiming self-defense is KRS section 503.050. The defense defined by this statute is absolute, entitling an accused to exoneration on the sole basis of a subjective belief in the need for self-protection. KRS section 503.120(1) purports to qualify this absolute defense by declaring the defense unavailable when the defendant's subjective belief is wantonly or recklessly mistaken. According to the supreme court, however, the Kentucky General Assembly did not define the lesser degrees of homicide (those committed through wantonness or recklessness) to include killings with a wanton or a reckless belief in the need for self-protection, thereby leaving the qualifying element of KRS section 503.120(1) unimplemented and the absolute defense of KRS section 503.050 fully intact. This interpretation of *Baker* and *Gray* leads to the absurd conclusion that a killing under a belief in the need for self-protection is totally free of criminal liability, no matter how grossly mistaken and unreasonable the belief might have been. No jurisdiction has ever contemplated such a lenient treatment for one who kills another person.

A second interpretation of *Baker* and *Gray* is plausible, based upon a literal reading of some language used by the supreme court in construing KRS 503.120. In *Baker*, the court stated:

K.R.S. 503.120 provides that an unreasonable belief that the use of force is necessary for self protection which would establish justification for an intentional act pursuant to K.R.S. 503.050 cannot be used as justification in a prosecution where wantonness or recklessness suffices to establish culpability. The commentary points out that while an unreasonable but actual belief in the necessity to use physical force for self protection will justify an intentional act, it cannot be used to justify a wanton or reckless act.⁷⁷

⁷⁷ *Baker*, 677 S.W.2d at 878.

Finding jury instructions on manslaughter in the second degree and reckless homicide inappropriate for an intentional killing under an unreasonable belief in the need for self-protection, the court in *Gray* said:

[B]y reason of K.R.S. 503.120, if a defendant believes that it is necessary to use deadly force to protect himself but that belief is found by a jury to be unreasonable, the defense of self-protection is not available as a defense to nonintentional crimes for which wantonness or recklessness suffices to establish culpability.⁷⁸

Since the supreme court had held previously that self-protection is available as a defense to a wanton or a reckless crime,⁷⁹ the court's statements in *Baker* and *Gray* can be interpreted to mean that KRS section 503.120(1) limits the availability of self-defense in wanton or reckless cases to situations in which the defendant's belief in the need for self-protection is reasonable.⁸⁰ Under this interpretation the defense of self-protection would exist for an intentional crime solely on the basis of the defendant's belief (a purely subjective standard), but would exist for an unintentional crime only when the belief is reasonable (an objective standard).

Major problems exist with both of these interpretations of *Baker* and *Gray*. The first leads to unqualified disaster for the law of homicide. The second does not correspond to the Code's definition of self-defense in KRS section 503.050, and in at least some instances, this interpretation leaves the law of homicide only slightly more rational than it would be under the first interpretation.

8

Floyd Butler came to trial in early 1986 after the *Baker* and *Gray* decisions. The trial court instructed the jury on all four homicide offenses: murder and manslaughter in the first degree on the basis of evidence indicating that he intended to cause

⁷⁸ *Gray*, 695 S.W.2d at 862.

⁷⁹ *Thompson v. Commonwealth*, 652 S.W.2d 78 (Ky. 1983).

⁸⁰ *Cf. Russell v. Commonwealth*, 720 S.W.2d 347 (Ky. Ct. App. 1986) (The court reversed a conviction for assault in the second degree because the trial court gave the *Blake* jury instructions. The court held that, in the absence of any evidence that the assault was unintentional, the reasonableness of the defendant's belief was immaterial.).

death and manslaughter in the second degree and reckless homicide on the basis of the evidence indicating that he did not intend to cause death. The judge then instructed the jury on self-defense substantially as follows:

A. Even though you might otherwise find the defendant guilty of intentional murder or first degree manslaughter, if you believe from the evidence that at the time he killed Gerald Miller (if he did so) he believed that Miller was about to use physical force upon him, he was privileged to use such physical force against Miller as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of Miller.

B. Even though you might otherwise find the defendant guilty of second-degree manslaughter or reckless homicide, if you believe from the evidence that at the time he killed Gerald Miller (if he did so) he had a reasonable belief that Miller was about to use physical force upon him, he was privileged to use such physical force against Miller as he reasonably believed to be necessary in order to protect himself against it, including the right to use deadly physical force in so doing only if he had a reasonable belief that it was necessary in order to protect himself from death or serious physical injury at the hands of Miller.⁸¹

These instructions were based on the second interpretation of *Baker* and *Gray*; if the jury believed the killing was unintentional, then Butler's belief in the need to use deadly force in self-protection had to be reasonable, but if the jury believed the killing was intentional, Butler's belief in the need for self-protection would suffice for self-defense even though unreasonable.

During the third hour of jury deliberations, Butler's counsel approached the judge and remarked: "Judge, under the self-defense instructions, the defendant would be better off if the jury disbelieves his testimony and finds that he killed the victim intentionally."⁸² Right! Under the facts of the case, the jury could disbelieve the testimony of the defendant and find that he killed the victim intentionally while acting under an unreasonable

⁸¹ See *supra* note 1.

⁸² *Id.*

belief in the need for self-protection. Under "Instruction A," drafted to comply with KRS section 503.050, the jury would be required to exonerate Butler and set him free. On the other hand, the jury could believe Butler's testimony and find that he killed unintentionally while acting under an unreasonable belief in the need for self-protection. Under "Instruction B," the jury must find him guilty of either manslaughter in the second degree or reckless homicide. In other words, a defendant who kills intentionally receives a more lenient treatment under the law than one who kills without intention. A defendant who kills intentionally is entitled to be unreasonable; a defendant who kills without intention is not.

9

The trial of Floyd Butler proves either that the law in this important area has simply lost its direction and logic or that the law of self-defense and homicide has become so complex and confusing that competent trial judges face insuperable obstacles in trying to administer trials. Currently, trial judges complain loudly about a lack of understanding of the appellate decisions, and they thirst for some clarity. A trial judge's primary responsibility is to give proper instructions on the law. As *Gray* and the two "battered wife" cases demonstrate, the use of once proper/now improper instructions coupled with the constitutional proscription against double jeopardy can result in exoneration of a convicted killer without the possibility of retrial on the merits. Defense attorneys may *want* the judge to give improper jury instructions, thereby creating grounds for reversal in the event of a conviction. A writer for the in-house journal of Kentucky's Department of Public Advocacy asserts that at least one case exists to support any fact situation and any argument a defendant wants to make.⁸³ Although the defendant in *Baker* objected and appealed because the judge failed to give an instruction that was less favorable than the instruction actually given, undoubtedly the defendant would have objected and appealed if the judge had given the less favorable instruction. Facing this dilemma, trial judges may be tempted to give

⁸³ Kallaher, *Self Defense*, ADVOCATE, A BI-MONTHLY PUBLICATION OF THE DPA, June 1987, at 27, 33.

a defendant whatever instruction he wants, hoping that the jury will do what is right.

How did the law of self-defense and homicide become so problematic and difficult almost immediately after the adoption of a new penal code? What is the best way to eliminate the problems and chart a better course for this part of the law? Perhaps a look at the first of these questions may provide an answer to the second.

The objective of the legislature, in enacting KRS sections 503.050 and 503.120(1), was to address a narrow and uncomplicated problem. The Commentary to the Kentucky Penal Code attempts to make this intention clear.⁸⁴ The two statutes have proved nonetheless to be very difficult to comprehend and apply. Much of this difficulty is seemingly traceable to some fairly small but critical flaws in the construction of the Code's language each of which has added unnecessary complexity and confusion to the law.

One misconception is that a homicide offender's state of mind can be measured in terms of its relationship to the offender's *act*. In most instances, the state of mind of such an offender is measured in terms of its relationship to the *result* of his act (namely, the death of the victim).⁸⁵ In one very important instance, the state of mind of a homicide offender is measured in terms of its relationship to a *circumstance* involved in the offender's conduct.⁸⁶ In no instance, however, do the provisions of the Code allow the culpable mental state for homicide to be measured in relationship to an offender's *act*.⁸⁷

⁸⁴ See KRS §§ 503.050, 503.120 1974 commentary (Baldwin 1984).

⁸⁵ For example, murder occurs when one intentionally causes the death of another, *i.e.*, the actor has death as his conscious objective. Manslaughter in the second degree occurs when one consciously disregards a substantial and an unjustifiable risk of death to another. In measuring the actor's mental state in these situations, the focus is on his state of mind in relationship to the *death* that he has caused.

⁸⁶ See *infra* notes 105-109 and accompanying text.

⁸⁷ This follows from a careful examination of KRS chapter 507 on homicide and KRS § 501.020, the provision defining the Code's mental states. The Code uses only four mental states to define crimes: "intentionally," "knowingly," "wantonly," and "recklessly." Each is defined so that it can be used in relationship to three different kinds of elements: the result of conduct, conduct itself, and circumstances surrounding conduct. The chapter on homicide uses all but the mental state of "knowingly" in defining homicide offenses. By examining the definition of "intentionally" in KRS 501.020, one can see that it is designed for use in relationship to (i) the result of conduct

One must read the self-defense cases carefully to understand the extent to which the supreme court has let its analysis get a bit off track by focusing upon the mental state of the accused in relationship to his act. For example, the court stated in *Baker*:

The general assembly did not provide, however, for the inclusion of an intentional offense within the definition of reckless homicide. We cannot escape the fact that *an act* claimed to be done in self defense is an *intentional act*. It is not a “reckless” act as that term is defined by statute.⁸⁸

In *Gray*, the court declared: “It is without question that the movant *intended to shoot* the victim. He admitted the shooting and attempted to justify it on the ground of self-protection. There is no evidence whatever that *his actions were anything other than intentional*.”⁸⁹ This flawed analysis has added significantly to the complexity and confusion in the law of self-defense. More importantly, it seems to have played a major role in the court’s pivotal *Baker* ruling that the homicide statutes of Kentucky cannot be construed to treat a killing under an imperfect claim of self-defense as either manslaughter in the second degree or reckless homicide.

A second misconception which has appeared in the opinions of the supreme court is that the defense of self-protection is not as applicable to unintentional crimes as it is to intentional crimes.⁹⁰ For example, the court in *Baker* pointed out: “We cannot escape the fact that an act claimed to be done in self-defense is an intentional act. It is not a ‘reckless’ act as that term is defined by statute.”⁹¹ In addition, the court stated recently:

[T]his Court cannot escape the fact that an act claimed to be

and (ii) conduct itself; it is not defined for use with respect to a circumstance, obviously because the offender does not intend a circumstance. By examining the homicide offenses in Chapter 507, one can see that “intentionally” is used only in relationship to the result of death. By examining the definitions of “wantonly” and “recklessly” one can see that they are designed for use only in relationship to the result of conduct and circumstances surrounding conduct but not in relationship to conduct itself. Therefore, the Code never measures the culpable mental state of a homicide offender in relationship to his conduct.

⁸⁸ *Baker*, 677 S.W.2d at 879 (emphasis added).

⁸⁹ *Gray*, 695 S.W.2d at 861 (emphasis added).

⁹⁰ *But see Thompson*, 652 S.W.2d at 78.

⁹¹ *Baker*, 677 S.W.2d at 879.

done in self-defense is intentional. It is not reckless as that term is defined by the statute.

There is no question that [the defendant's] act of shooting was intentional. The instructions on specific offenses should be limited to intentional crimes.⁹²

These statements imply that self-defense belongs exclusively to the realm of intentional crimes. Neither legal authority nor logic supports such a position.

Limiting self-defense to intentional crimes would lead clearly to irrational results. The following hypothetical is illustrative. Suppose that a sober man encounters a threat of death or serious bodily injury from a drunken man wielding a knife. Without intending to kill or to injure, the sober man shoots at the feet of the drunken man in an attempt to thwart the threat; however, the gunshot ricochets off the pavement and causes the death of the drunken man. Believing that the sober man acted imprudently (and thus criminally) in causing this death, a grand jury indicts him for manslaughter in the second degree or reckless homicide; it refuses to indict him for murder due to the absence of an intent to kill. Although no doubt exists that the offender's act of shooting was intentional, the indictment charges unintentional homicide. Does this mean that the offender cannot claim the defense of self-defense? The answer is surely no, unless one concludes that an actor trying to defend himself without causing another's death is more culpable than one who tries to defend himself by intentionally causing the death of another.

A third misconception about the Penal Code's provisions on homicide and self-defense dwarfs the prior ones in terms of importance. Under the Code, a person may wantonly or recklessly cause the death of another through gross carelessness in assessing the need for self-protection and may be guilty of manslaughter in the second degree or reckless homicide even though he acts with an intent to kill. The supreme court's failure to recognize this proposition is more responsible for the self-defense problem that this Special Comment addresses than all other factors combined. Treating intentional homicide under concepts

⁹² *Randolph v. Commonwealth*, 716 S.W.2d 253, 256 (Ky. 1986) (citing *Gray*, 695 S.W.2d at 860).

traditionally reserved for only unintentional homicides has proved very troublesome for the court. The difficulty has surfaced most noticeably in the court's attempt to ascertain the legislature's intention in adopting KRS sections 503.050 and 503.120(1).

The new Kentucky Penal Code came into existence at the beginning of 1975. In 1980, the supreme court reviewed the *Blake* case. The court construed the self-defense provisions of the Code to reflect a legislative intent consistent with the proposition that an offender may be guilty of manslaughter in the second degree or reckless homicide even though he acts with an intent to kill. It may have been significant that two members of the court which reviewed *Blake*, Chief Justice Palmore and Justice Lukowsky, were members of the Advisory Committee that prepared a draft of the new Penal Code for the legislature's consideration.

Four years later, when *Baker* arrived for review, the court had five new members and a very different viewpoint about legislative intent:

The general assembly did not provide . . . for the inclusion of an intentional offense within the definition of reckless homicide. . . .

. . . .

Statutes which create criminal offenses should do so in express terms and criminal liability should not rest upon implication or inference as to what the General Assembly intended but did not expressly state.⁹³

The court in *Baker* examined the pertinent provisions of the Code at length and overruled *Blake*, holding that manslaughter in the second degree and reckless homicide are not appropriate for intentional killings.

10

Three years have passed since the decision in *Baker*. The case continues to be troublesome, even for the supreme court. The court has reexamined its position in two recent cases. *Commonwealth v. Rose*⁹⁴ involved a claim of self-defense by a "bat-

⁹³ *Baker*, 677 S.W.2d at 879-80.

⁹⁴ 725 S.W.2d 588 (Ky. 1987). The court decided *Rose* on January 22, 1987, only 23 days after issuing the finality endorsement in *Ford*. 34 Ky. L. SUMM. 1 at 116 (Ky. Dec. 30, 1986).

tered wife.” After killing her husband and being charged with murder, the defendant admitted in her testimony to shooting the victim intentionally in what she claimed to be a perceived need for self-protection. The trial judge gave jury instructions similar to those that the supreme court approved in *Blake* but disapproved in *Baker* and *Gray*.⁹⁵ Under the guidance of these instructions, the jury convicted the defendant of manslaughter in the second degree.

The Kentucky Court of Appeals reviewed the conviction and reversed, presumably under the authority of *Baker* and *Gray*.⁹⁶ The Kentucky Supreme Court reversed the court of appeals, reinstated the verdict, and made a statement about legislative intent that seems to be substantially at odds with its earlier position: “The Penal Code was intended to provide Manslaughter II as a lesser homicide offense to murder to punish an unjustified killing under circumstances such as this which warrant a conclusion of diminished culpability, but do not warrant exoneration.”⁹⁷ The *Rose* decision was unanimous, but a concurring opinion leaves little doubt that disagreement over the matter of legislative intent continues to influence the court’s deliberations.⁹⁸

By adopting KRS sections 503.050 and 503.120(1), thereby eliminating the possibility of a murder conviction for a killing under an imperfect claim of self-defense, the Kentucky General Assembly clearly intended to group intentional killings of this type with homicide offenses previously reserved for only unintentional killings. Although the legislature perhaps could have manifested its intention in a more emphatic fashion, the self-defense and homicide statutes are susceptible to an interpretation fully compatible with legislative intent. The opinion in *Rose*, notwithstanding its failure to overrule *Baker* and *Gray*, offered some hope that the supreme court might slide into alignment with legislative intent, but that changed when the court made its

⁹⁵ See *supra* note 60.

⁹⁶ Commonwealth v. Rose, No. 85-CA-2223-MR (Ky. Ct. App. June 13, 1986) (unpublished opinion).

⁹⁷ *Rose*, 725 S.W.2d at 592.

⁹⁸ Justice Vance concurred in the result in *Rose* by distinguishing the prior cases on their facts. *Id.* at 593.

most recent statement on the subject in *Smith v. Commonwealth*.⁹⁹

The problem in *Smith* did not touch the law of self-defense even remotely. Nonetheless, both sides of a divided court addressed the issue. Writing for the majority, Justice Vance, the author of the *Baker* and *Gray* opinions and the *Rose* concurrence, minimized the importance of *Rose*:

The precedential value of *Baker* has been eroded by our decision in *Commonwealth v. Rose* . . . in which we upheld a conviction of second-degree manslaughter where the defense offered was self-protection, but the defendant contended that she did not intend to cause the death of the victim. Because intentional murder requires intention to cause death, under the circumstances in *Rose*, a jury could have believed that the defendant shot her husband, believing it necessary for her self-protection, but that she did not actually intend to cause his death. The circumstances were such, however, that the jury could believe that her conduct was wanton as defined by statute in that she was aware of and consciously disregarded a substantial risk that death would result. Thus, the instruction on second-degree manslaughter was proper.¹⁰⁰

In dissent, Justice Leibson, who had written the court's opinion in *Rose* after disagreeing with the majority in both *Baker* and *Gray*, spoke more generally and more emphatically:

The approved practice in homicide cases in this jurisdiction until the advent of *Baker* and *Gray*, and the better practice, was for the trial court's instructions to present the jury with a menu of offenses, covering every arguable mental state, conflicting or not, and let the jury, as a trier of fact, decide which offense best described the circumstances of the killing. . . .

As attested by the present opinion, the opposite approach simply creates confusion and then compounds it.¹⁰¹

The *Smith* holding takes nothing from nor adds anything to the earlier decisions on self-defense. Nevertheless, the case is signif-

⁹⁹ 737 S.W.2d 683 (Ky. 1987).

¹⁰⁰ *Id.* at 687-88.

¹⁰¹ *Id.* at 690 (Leibson, J., dissenting) (citing Blake, 607 S.W.2d at 422).

icant because it leaves no doubt that disagreement reigns in the chambers of the only court with the authority to solve the problems that have engulfed this very important area of Kentucky law.

11

What is to be done? The status quo is obviously undesirable. Perhaps the Kentucky General Assembly should address the problem with new legislation. The cases suggest that the existing statutes may be too complicated to be functional and that legislative intervention is unavoidable. Assuming this to be true, there are at least four options deserving of consideration by the General Assembly.

The *first* option is to restore the law to its existence prior to the adoption of the new Code. Only minor adjustments in existing statutes would be necessary to implement this change in the law. The legislature could repeal KRS section 503.120(1) and amend KRS section 503.050 (along with other defenses of justification sections) to require reasonable grounds for beliefs which justify the use of force against another.

A majority of states probably still include in the definition of self-defense (and other defenses of justification) the age-old requirement of reasonableness in the defendant's beliefs.¹⁰² Some states simply have not put the old common-law rule under scrutiny; others have retained the traditional approach after thought and deliberation. The strength of this *first* option is in its familiarity and simplicity. Its fundamental weakness is that a person who kills in cold blood and one who kills with an unreasonable belief in the need for self-protection are grouped together for purposes of penalty.

Several questions are pertinent to the merits of this option. Does a significant difference exist between the culpability of a person who kills in cold blood and the culpability of one who kills with an unreasonable belief in the need for self-protection? Does the murder penalty range, *i.e.*, twenty years to life, accommodate the culpability differences that may exist between the two offenders? Does the strength of the traditional rule outweigh the need for a more equitable treatment of offenders? In 1974,

¹⁰² See W. LAFAYE & A. SCOTT, *supra* note 41, at 457.

the Kentucky General Assembly considered these questions and rejected the traditional rule. The only new development since 1974 is a vividly demonstrated difficulty with the Code's approach.

A *second* legislative option would involve the use of manslaughter in the first degree (common-law voluntary manslaughter) as the crime committed by intentional offenders who kill under an imperfect claim of self-defense. To implement this change, the legislature would repeal KRS section 503.120(1) and expand the definition of manslaughter in the first degree to include the offender who intentionally kills under an unreasonable belief in the need for self-protection. Illinois and Wisconsin have adopted this approach in comprehensive modernizations of their criminal codes.¹⁰³

This option would alleviate the problem of having two vastly different offenders in a single category of homicide for penalty purposes. It would leave most of the traditional law of self-defense intact and thus retain much simplicity. On the other hand, it would not address the full scope of the problem that existed under the traditional law. For example, an offender who assaults someone under an unreasonable belief in the need for self-protection (without causing death) would not find in the law of assault the favorable treatment he would find in the law of homicide. Also, the *second* option would not address the problem of offenders who kill under imperfect claims of defense of property, habitation, or effecting arrest; the existing provisions of the Kentucky Code do not contain such weaknesses. The *second* option, in other words, would be neither as complete nor as logical as KRS sections 503.050 and 503.120(1). However, it would provide relief from the complexity of the existing law.

As a *third* option, the legislature could accept a suggestion made by the supreme court in *Baker* and expand the definition of reckless homicide to include the offender who kills another under a mistaken and an unreasonable belief in the need for self-protection.¹⁰⁴ If the legislature believes that the penalty for reckless homicide is inadequate, it could expand the definition

¹⁰³ See ILL. ANN. STAT. ch. 38, para. 9-2 (Smith-Hurd Supp. 1987); WIS. STAT. ANN. § 940.05 (West 1982).

¹⁰⁴ See *Baker*, 677 S.W.2d at 879.

of manslaughter in the second degree to include this offender. Once again, the legislature would need to repeal KRS section 503.120(1) and amend KRS section 503.050.

Except to the extent that this option provides lower penalties, it is not very different from the *second* option. It may match culpability of offenders better than the *second* option, since a mistaken killing in self-defense seems more closely akin to an inadvertent killing through gross carelessness than to an emotional killing under provocation. It would provide a less complex approach to self-defense than existing law provides. However, like the *second* option, it would not be as complete or as logical as the existing Kentucky statutes.

As a *fourth* option, the legislature could amend KRS section 503.120(1) to express legislative intent more clearly than it was expressed in the Penal Code in 1974. The amended statute would state:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the defendant may not be convicted of an offense for which intention is required to establish culpability (because of the availability of a defense of justification as defined in this chapter), but he may be convicted of a lesser offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

Hopefully, this option would resolve the supreme court's difficulty with existing self-defense and homicide provisions of the Code.

This Special Comment should not end without making a case for the existing statutes. The Kentucky General Assembly and the drafters of the new Code had a sound objective in 1974. The Comment to the Model Penal Code describes this objective well:

The unreasonableness of an alleged belief quite properly is considered as evidence that it was not in fact held, but if the tribunal is satisfied that the belief was held, the defendant, in a prosecution for crime founded on wrongful [intention], should be entitled to be judged as if his belief was [sic] true. To convict for a belief arrived at on an unreasonable ground is to convict for negligence. Where the crime otherwise requires greater culpability for a conviction, it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish a justification.

. . . In homicide, for example, the distinction between [intentional] and reckless homicide has enormous import when it comes to the degree of the offense and to the sentence. And it makes more sense to assimilate the defendant who is reckless as to the existence of justifying circumstances to one who recklessly takes life than to assimilate him to one who [intentionally] does so.¹⁰⁵

The current statutory scheme of KRS sections 503.050 and 503.120(1) establishes a sound framework within which to resolve self-defense claims. The statutory scheme is fair because it groups offenders according to culpability, logical because it treats all defenses of justification identically, and complete because all offenses involving force against another person (homicide, assault, and attempt) trigger an application of the same set of self-defense rules. The existing statutes are undoubtedly more complex than the traditional law of self-defense, but they are workable.

A clarifying opinion by the Kentucky Supreme Court is essential. The court needs to reexamine the relationship between homicide and imperfect claims of self-defense with the following vitally important point about KRS section 503.120 clearly in mind: *In construing this statute courts must focus attention on the offender's mistaken belief in the need for self-protection, for it is this mistaken belief that provides the culpability for his crime.* The homicide and self-defense statutes are less perplexing and more functional from this perspective.

Manslaughter in the second degree occurs when one "wantonly causes the death of another,"¹⁰⁶ and reckless homicide

¹⁰⁵ MODEL PENAL CODE § 3.09 comment at 151-52 (1985).

¹⁰⁶ KRS § 507.040.

occurs when, “with recklessness [one] causes the death of another”¹⁰⁷ The Code defines “wantonly” and “recklessly” as follows:

A person acts *wantonly* with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

A person acts *recklessly* with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.¹⁰⁸

Under these definitions, a person may act culpably *with respect to a result* described by a statute defining an offense or *with respect to a circumstance* described by a statute defining an offense.

With imperfect self-defense, the offender’s culpability stems from his mistaken belief in the need for self-protection. A belief of this type is *not* a “result described by a statute”, it is a “circumstance described by a statute.”¹⁰⁹ More importantly, the belief is a circumstance that KRS section 503.120 describes in defining criminal offenses—specifically, homicide and assault resulting from the use of force under a false and an unreasonably held belief in the need for self-protection. Considering the definitions of “wantonly” and “recklessly” with respect to this *circumstance* (something the Kentucky Supreme Court has failed to do) results in a clear and workable description of homicide offenses for killings under imperfect claims of self-defense.

¹⁰⁷ *Id.* at § 507.050.

¹⁰⁸ *Id.* at § 501.020(3)-(4) (emphasis added).

¹⁰⁹ *Id.*

A killing under a belief in the need for self-protection would be manslaughter in the second degree upon a showing of the following elements: (i) the defendant acted in the face of a substantial and unjustifiable risk of mistaken belief in the need for self-protection; (ii) he was aware of and consciously disregarded the risk that he was mistaken in his belief; and (iii) in acting, he grossly deviated from the standard of conduct that a reasonable person would have observed in the same situation. A killing under a belief in the need for self-protection would be reckless homicide upon a showing of the following elements: (i) the defendant acted in the face of a substantial and unjustifiable risk of mistaken belief in the need for self-protection; (ii) before acting, he failed to perceive the risk that he was mistaken in his belief; and (iii) in acting, he grossly deviated from the standard of conduct that a reasonable person would have observed in the same situation.

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What about Floyd Butler? How did the jury handle the intentional/unreasonable and unintentional/reasonable dichotomy of that case?

The jury never reached the self-defense issue. Disbelieving that Butler acted in self-protection, the jury found him guilty of manslaughter in the second degree and fixed his punishment at seven years imprisonment. The verdict was reportedly a compromise among six jurors who believed that Butler intended to kill the victim but acted under extreme emotional disturbance, four jurors who believed he killed Gerald Miller without intent to cause death, and two jurors who believed that a man's home is his castle.

