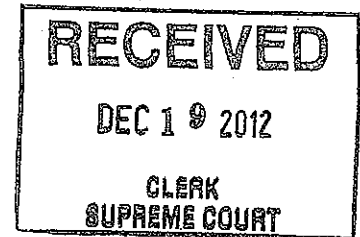


Supreme Court of Kentucky
File No. 2011-SC-774-MR



Michael St. Clair

Appellant

v.

Appeal from Bullitt Circuit Court
Hon. Geoffrey P. Morris, Judge
Indictment No. 92-Cr-00010-2

Commonwealth of Kentucky

Appellee

Brief for Appellant St. Clair

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Certificate of Service:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed postage prepaid to Hon. Geoffrey P. Morris, Jefferson Circuit Judge, 700 West Jefferson, Louisville, KY 40202; the Hon. Dana M. Todd, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; the Hon. Scott Drabenstadt, Kamenish Law Office, 239 S 5th Street # 1916, Louisville, KY 40202-3209; the Hon. Justin Brown, 436 South 7th Street, Suite 100, Louisville, KY 40203; and the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601, on December 19, 2012. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.



Susan J. Balliet

Introduction

Michael St. Clair was originally tried, convicted, and sentenced to death in 1998 for the murder of Frank Brady in Bullitt County. This Court vacated his death sentence in 2004 and remanded for a second sentencing trial. After that trial ended in a death sentence, this Court reversed in 2010 for a third sentencing trial, and a third death sentence was imposed in 2011. St. Clair appeals as a matter of right.

Statement Concerning Oral Argument

Mr. St. Clair requests oral argument because the death penalty has been imposed, and because of the complexity of the record after three trials and over 15 years of litigation. Oral argument is mandated by KRS 532.075(4).

Preface

Appellate review of a case involving the death penalty requires great caution. Under KRS 532.075(2) this Court reviews unpreserved errors as well as preserved errors when the death penalty has been imposed because “[d]eath is unlike all other sanctions....” *Beck v. Alabama*, 447 U.S. 625 (1980); *Rogers v. Com.*, 992 S.W. 2d 183, 187 (Ky. 1999); *Perdue v. Com.*, 916 S.W. 2d 148, 153-154 (Ky. 1995); *Cosby v. Com.*, 776 S.W. 2d 367 (Ky. 1989); *Campbell v. Com.*, 564 S.W.2d 258, 531 (Ky. 1979). Under KRE 103(e) this Court considers “insufficiently raised or preserved” errors and grants relief “upon a determination that manifest injustice has resulted from the error.” In a death case there is no reasonable justification for trial counsel’s failure to object to any substantial error and such failures cannot be considered a legitimate trial tactic. Without the unpreserved errors as well as the preserved errors raised here, the jury might not have sentenced Michael St. Clair to death. *Perdue*. In accordance with CR 76.12(4)(c)(iv),

counsel have noted at the beginning of each issue whether it is preserved. Where the issue is unpreserved counsel will not repeat reference to KRS 532.075(2), KRE 103(e), RCr 10.26 or the other authorities cited in this paragraph

Record Citations

The following abbreviations are used in referring to the appellate record:

TR1 – Transcript of record, original trial in 1998

TH1 – Transcript of hearings, original trial in 1998

TE1 – Transcript of evidence, original trial in 1998

TR2 - Transcript of record, second sentencing trial in 2005

TH2 - Transcript of hearings, second sentencing trial in 2005

TE2 - Transcript of evidence, second sentencing trial in 2005

TR3 – Transcript of record, third sentencing trial in 2011

CD3 – Record of hearings, voir dire, and evidence in 2011

EX - exhibit

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by Ct. order
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Statement of the Case

After a Bullitt County jury convicted him for the murder of Frank Brady, Michael Dale St. Clair was tried and sentenced to death in 1998.¹ This Court reversed the original death sentence in 2004 because the 1998 trial court instructions failed to permit the jury to consider a sentence of life without possibility of probation or parole (LWOP). *St. Clair v. Commonwealth*, 140 S.W.3d 510, 524 (Ky. 2004) (*St. Clair I*). A second death sentence was imposed on September 30, 2005. But this Court reversed and ordered a third sentencing trial because the second trial court's instructions permitted the jury to find an aggravating factor even if St. Clair had no prior conviction for a capital offense when the instant offense was committed, and this fact denied St. Clair a unanimous verdict. *St. Clair v. Commonwealth*, 319 S.W.3d 300, 303-04 (Ky. 2010), as modified on denial of reh'g (Sept. 23, 2010) (*St. Clair II*).

On March 2, 2011, the Commonwealth announced it would present the same summaries and live witnesses in the same order in this third sentencing trial as it had in the 2005 second sentencing trial.² However, in this third sentencing trial, as detailed below, in addition to the evidence presented in 1998 and 2005, the Commonwealth introduced highly prejudicial new evidence never seen before by any of St. Clair's prior juries.

On October 2, 2011, St. Clair requested the court not to instruct the jury on LWOP as a possible sentence.³ On October 11, 2011, St. Clair objected to the introduction of any mental health evidence and stated that he would not offer any mental

¹ [Judgment and] Sentence of Death, TR1, 1040-1042, at Tab 2.

² CD3, Hearings, 3/02/11, 9:37:19

³ Annotation on Defense tendered instructions, TR3-I, 142.

health evidence in mitigation.⁴ As argued below, Appellant moved *pro se* to be exempted from the death penalty because his mental age is that of a juvenile.

The trial court conducted a pre-trial hearing and determined that St. Clair's limited waiver of representation was knowingly, voluntarily, and intelligently made.⁵ As in the second sentencing trial, in this third sentencing trial St. Clair limited his *pro se* participation to written and oral motions.

The third sentencing trial commenced on October 18, 2011, in Bullitt County. As detailed below in Argument 4, instead of following this Court's prescribed procedures for voir dire, the court and the parties agreed among themselves to conduct general voir dire by the "Jefferson County method," which involved massing the entire 100-member venire panel together and questioning them all at once.

The Prosecution Case

Many prosecution witnesses were presented by agreed summaries read to the jury by the prosecutors.⁶ Many more witnesses were presented live. Most notably **Dennis Reese**—Appellant's co-defendant and the prosecution's star witness-- testified live for almost five hours (minus a lunch break).⁷ As detailed in Argument 13, Reese provided grisly new guilt-phase details never heard by Appellant's 1998 jury. **Mike Minton**, a detective working for the Lebanon Kentucky Police Department in October of 1991, gave live testimony describing the scene where Frank Brady's body was found.⁸ **Bob Wallace**

⁴ TE3-II, 166; CD3 Hearings, 10/17/11, 9:30:58 – 9:33:39

⁵ CD3, Hearings, 1/19/11, 9:55:47 – 10:12:27.

⁶ **James Montoya**, New Mexico investigator of Tim Keeling murder, CD3 Trial, 10/24/11, 10:56:50; **Jane Holbert**, convenience store worker, last to see Frank Brady alive, CD3 Trial, 10/24/11, 11:19:58; **Martin Comely**, who identified Appellant leaning on truck at convenience store, CD3 Trial, 10/24/11, 11:22:32;

⁷ CD3 Trial, 10/25/11, 9:05:27 - 1:43:29; **Mary Weedman**, who saw the white truck on fire and called 911,

⁸ CD3 Trial, 10/24/11, 9:49:10; **Chris Knight**, volunteer fire fighter, CD3 Trial, 10/24/11, 11:31:02; Det. **John Carr**, original lead KSP detective on case, CD3 Trial, 10/24/11, 1:17:48; **Billy Van Zant**, Oklahoma,

from Bryan County, Oklahoma, described Appellant and Reese's escape from the Bryan County Jail in great detail.⁹ Tim Keeling's widow **Lisa Marie Keeling** testified live providing evidence never before heard by any of Appellant's prior juries.¹⁰ The Commonwealth admitted that the widow Keeling had never testified before.¹¹ Her brand new "victim impact" evidence is detailed below in Argument 9. **William Ulner**, an arson investigator from Louisville, testified live about Keeling's burned Toyota truck.¹²

Trooper Butch Bennett from the Elizabethtown Kentucky State Police (KSP) post testified extensively about the gunshots Appellant fired into his vehicle and his identification of Appellant.¹³ **KSP Officer Ronnie Crain** testified in person about the Kentucky manhunt for Appellant and Reese and the items recovered from Brady's truck. He introduced bullet fragments from Frank Brady's autopsy.¹⁴ **Robert Melton**, the KSP detective who took over as lead when Detective Carr retired, testified live about processing fingerprints from Bennett's police cruiser, about viewing Frank Brady's body at the crime scene, and about riding around with Dennis Reese while Reese showed him locations of events.¹⁵ The coroner **Barbara Weekly Jones** testified live that —while she couldn't say whether Brady was kneeling or standing when he was shot—one of his

CD3 Trial, 10/24/11, 3:01:17; **Robert Chatham**, regarding Appellant's phone calls to Oklahoma, CD3 Trial, 10/24/11, 3:04:21; **Betty Carden**, regarding Appellant's phone calls to his mother and others in Oklahoma, CD3 Trial, 10/24/11, 3:08:59; Mike Johnston, KSP trooper, CD3 Trial, 10/24/11, 3:13:01; **Harold Antle**, KSP trooper, CD3 Trial, 10/24/11, 3:14:26; Scott Doyle, KSP forensics, CD3 Trial, 10/24/11, 3:16:28; **Richard Crum**, FBI firearms expert who testified the bullets from Bennett's cruiser were "identical" to bullets connected with Tim Keeling murder; CD3 Trial, 10/24/11, 3:26:47 – 3:34:05 and 10/25/11, 9:01:38 – 9:05:20; **James LeBoeuf**, Bryan County, OK, jail administrator, CD3 Trial, 10/25/11, 3:02:38; **William Taylor**, police chief Lexington, OK, re Bryan Co jail break, CD3 Trial, 10/25/11, 3:06:28; **Stanley Slonina**, KSP latent fingerprints, CD3 Trial, 10/25/11, 3:08:48;

⁹ CD3 Trial, 10/24/11, 10:04:45 – 10:53:14 and CD3 Trial 10/26/11, 1:54:44 – 2:10:30.

¹⁰ CD3 Trial, 10/24/11, 11:06:02 – 11:22:32.

¹¹ CD3 Hearings, 10/17/11, 9:50:15.

¹² CD3 Trial, 10/24/11, 11:33:35 – 11:35:16.

¹³ CD3 Trial, 10/24/11, 12:53:03 – 1:17:48.

¹⁴ CD3 Trial, 10/24/11, 1:50:01 – 2:05:20.

¹⁵ CD3 Trial, 10/24/11, 2:26:47 – 3:01:17 and CD3 Trial, 10/25/11, 1:45:20 – 2:00:00.

wounds was “consistent” with the shooter standing and Brady kneeling and begging or praying.¹⁶

The testimony of Appellant’s ex-wife **Bylynn Van Zant** was dramatized by one prosecutor playing the part of Bylynn and the other playing the prosecutor who questioned Ms. Van Zant at her deposition.¹⁷ **Lane Able**, the circuit clerk from Bullitt County, testified live presenting Appellant’s past criminal record in Oklahoma.¹⁸ The prosecution also play-acted **Appellant**’s redacted testimony at the 1998 trial, with prosecutor Lewis playing the Appellant, and prosecutor Todd playing the 1998 prosecutor.

In his testimony from 1998, Appellant stated that he and Reese parted ways in Texas and he was not with Reese in Denver, New Mexico, or Kentucky.¹⁹

Oklahoma State Bureau of Investigation investigator **Perry Unruh** was flown in to present live dramatic details about the September 1991 Bryan County jail break and the December 1991 capture of Appellant.²⁰ **Frank Brady’s daughter Michelle Brady Walker** was the last prosecution witness. She presented live “victim impact” testimony.²¹

Among other witnesses, **the defense** put on **Chris Shouse**, who had spent seven days with Dennis Reese in the Shelby County Detention Center. Reese told Shouse that he had killed a hitchhiker in Kentucky “for the hell of it,” did not say anyone else was involved, and never mentioned Appellant in connection with the Bullitt County murder.²²

Joseph Collins from Eastern Kentucky Correctional Center testified that he also knew

¹⁶ CD3 Trial, 10/24/11, 2:00:45 – 3:02:38.

¹⁷ CD3 Trial, 10/25/11, 3:18:55 – 3:55:00.

¹⁸ CD3 Trial, 10/26/11, 9:02:46 – 9:58:56.

¹⁹ CD3 Trial, 10/26/11, 10:24:15 – 1:39:31.

²⁰ CD3 Trial, 10/26/11, 2:10:53 – 2:58:49.

²¹ CD3 Trial, 10/26/11, 2:59:22 – 3:17:00.

²² CD3 Trial, 10/27/11, 9:04:46 – 9:09:31.

Reese from the Shelby County Jail. Reese told Collins he killed people in Kentucky, did not indicate anyone else was involved, and never mentioned Appellant. Collins said Appellant told him that he and Reese parted ways "in Kentucky."²³

Don Ed Payne was a district court judge for three counties in Oklahoma. He testified that before becoming a judge he practiced criminal defense for 23 years, and represented Appellant when he was charged with killing Ed Large and Mary Smith. Payne testified that Appellant knew both Large and Smith before he killed them and also knew his other two murder victims, Ronnie St. Clair and William Kelsey. According to Payne, before the accusations related to Kentucky and New Mexico Appellant had never been accused of violence against a stranger.²⁴ Judge Payne was familiar with Appellant's family. "They were poor, extremely poor... small towns have families like this, a notorious family, emotional people, not educated people...[people with] family disagreements and affiliations full of emotion and volatility."²⁵

Appellant St. Clair testified.²⁶ He said after Reese talked him into escaping from the Bryan County Jail in Oklahoma, Appellant bribed the jailers \$500 apiece to escape and staged the escape in a way to keep the jailers out of trouble.²⁷ It was Reese's idea to break into the Stephens' house, and Appellant went along to try to keep the Stephens' from being killed. Appellant said he got Stephens' gun and the Stephens' weren't killed or tied up.²⁸

²³ CD3 Trial, 10/27/11, 9:36:47 – 9:43:53.

²⁴ CD3 Trial, 10/27/11, 9:44:11 – 9:50:31 and 9:52:02.

²⁵ CD3 Trial, 10/27/11, 9:51:13.

²⁶ CD3 Trial, 10/27/11, 9:58:48 – 11:56:31.

²⁷ CD3 Trial, 10/27/11, 10:02:00 – 10:07:15.

²⁸ CD3 Trial, 10/27/11, 11:11:20 – 11:12:51.

Appellant said that on September 24, 1991, he and Reese split up. Appellant stayed in a motel in Denton, Texas, while Reese headed west with the Stephens' pickup truck. Appellant gave him \$200 and let him take Stephens' gun and the truck on condition he would park the truck somewhere and call the reporter Richard Chase and tell him where the Stephens' could find it. Appellant saw Reese again four or five days later on September 28 or 29. Reese showed back up at the motel in Denton in a white pickup with a friend named John and said he had stolen the truck.²⁹ But Reese didn't tell Appellant he had killed Tim Keeling.³⁰

From Denton, Appellant headed with Reese to Louisiana. From a payphone Appellant dialed Chase and put Reese on the line to tell him where the Stephens' truck was.³¹ After about three days in Louisiana, he and Reese came to Kentucky in the white truck.³²

In Kentucky they drove up and down I-65 past truck stops and rest areas. Reese was talking about robbing gay people, but Appellant "wasn't into that." They stopped and slept in a rest area. The next day they went to a flea market. From there Appellant called a friend in Oklahoma and got an answering machine.

They stopped to get gas. Reese nearly bumped into a man coming out of the gas station, and Reese was afraid the man might have recognized him.³³ They drove back to the rest area. Reese said if you hit your brake lights twice, it means you're gay, and if the other person hits their lights twice in return, it means they're gay, and "it's a connect." A

²⁹ CD3 Trial, 10/27/11, 10:14:13 – 10:17:26.

³⁰ CD3 Trial, 10/27/11, 10:22:58 and 10:34:55 – 10:35:50.

³¹ CD3 Trial, 10/27/11, 10:20:55 – 10:21:49.

³² CD3 Trial, 10/27/11, 10:20:55 – 10:21:49.

³³ CD3 Trial, 10/27/11, 10:21:49 – 10:25:24.

red maroon truck came through. Reese hit his lights twice, the maroon truck hit its lights twice, and Reese said, "I've got a live one." Reese got out, and in two minutes the man had let Reese into his truck.³⁴ The man was driving his own truck with both hands on the steering wheel, not handcuffed. Reese was his passenger. They drove by the white truck where Appellant was, and Reese told Appellant, "I'm going to be gone for a while." While Reese was gone with the man, Appellant drove the white pickup and got something to eat at the truck stop. He made more phone calls.³⁵

After a while, Reese pulled up in Brady's truck alone and told Appellant to get all his stuff and put it in the red truck. Reese said, "Follow me, I'm going to ditch this truck." They drove somewhere and Reese set the white truck on fire to get rid of their fingerprints. They drove back to the truck stop, got gas, and Reese got something to eat.³⁶

Leaving the truck stop, they saw Trooper Bennett in his cruiser and thought he was looking at them. Reese said, "I've got a dead body on this truck."³⁷ Hearing that, and knowing he had life sentences waiting for him in Oklahoma, Appellant decided he couldn't let himself get arrested. Reese had the gun, but Appellant grabbed it and shot to disable Bennett's car. Reese took off and drove straight across the road, blowing out the tires on the "little rises." Reese and Appellant parted ways, and Appellant made it back to Oklahoma. He wasn't with Reese when Tim Keeling was kidnapped and killed. He knew Reese was going to rob Brady, but he himself had nothing to do with robbing or killing.

³⁴ CD3 Trial, 10/27/11, 10:25:24 – 10:27:29.

³⁵ CD3 Trial, 10/27/11, 10:27:29 – 10:30:55.

³⁶ CD3 Trial, 10/27/11, 10:30:28 - 10:32:12..

³⁷ Brady's physical body was not on the truck. Appellant explained what Reese meant was that he had just killed Brady. The last time Appellant saw Brady was when he drove off with Reese in his red maroon truck. CD3 Trial, 11:45:26 – 11:47:50.

Brady.³⁸ Appellant admitted killing his uncle Ronnie St. Clair, but explained it was because Ronnie was competing with Appellant in the drug business and had hired William Kelsey to kill Appellant.³⁹ Large was a drug dealer who had shot Appellant's brother. Mary Smith had stabbed Appellant's aunt "over drugs" and left her for dead. Appellant had heard that Large was going to kill him.⁴⁰

In this third trial, the jury was instructed as ordered by this Court in both *St. Clair I* and *II* that in order to recommend a death penalty it had to find that the murder of Frank Brady was committed by a person who had a prior record of conviction of a capital offense at the time Frank Brady was murdered. *St. Clair I*, 140 S.W.3d at 571 ("Upon remand, the trial court should instruct the jury in accordance with the statutory language, i.e., the murder was committed by a person with a prior record of conviction of a capital offense."); *St. Clair II*, 319 S.W.3d at 305 ("Now, despite our directive to follow the statutory language of KRS 532.025(2)(a)(1), we again face an improper jury instruction on the same aggravating circumstance.").

The trial lasted nine days from Tuesday, October 18, 2011, through Friday, October 28, 2011. The jury deliberated a little over two hours and returned with a death verdict around 2:00 p.m. on October 28.⁴¹

On November 3, 2011, Appellant moved for a new trial and for judgment notwithstanding the verdict, incorporating all motions made in the 1998 trial, objecting to

³⁸ CD3 Trial, 10/27/11, 10:33:01 – 10:40:00.

³⁹ CD3 Trial, 10/27/11; 11:27:46 – 11:28:46.

⁴⁰ CD3 Trial, 10/27/11, 11:29:21 – 11:35:23.

⁴¹ CD3 Trial, 10/28/11, 11:18:59 – 1:52:45.

the use of any prior opinions as law of the case, and incorporating the motion for new trial based on new lead bullet analysis evidence.⁴²

The trial court imposed the recommended death sentence on St. Clair on November 16, 2011.⁴³

Arguments

GUILT PHASE ISSUES

1. A new guilt phase trial is required due to new forensic evidence.

Preservation. This issue is preserved. Within a year of receiving information that the FBI had acknowledged lead bullet analysis is junk science, Appellant timely filed a CR 60.02 motion in circuit court seeking a new trial.⁴⁴ The matter was initially heard on July 27, 2010,⁴⁵ and discussed again on December 8, 2010.⁴⁶ When the circuit court denied his motion, Appellant filed an original action in the Kentucky Court of Appeals. He later voluntarily dismissed the action when the Commonwealth argued the 60.02 denial was interlocutory and could be consolidated with this appeal of the third resentencing trial.⁴⁷ The trial court agreed, noting that a motion under RCr 10.02 is similar to a new trial motion, which --if not granted-- becomes part of the appeal.⁴⁸

Standard of Review. RCr 10.02 provides that a new trial is warranted when a defendant has been denied a fair trial. The standard for determining whether a new trial is

⁴² TR3-IV, 589-590.

⁴³ Judgment of Conviction [and Death Sentence], TR3-IV, 591-593, attached at Tab 1.

⁴⁴ "A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits." RCr10.06(1).

⁴⁵ CD3, Hearings, 10/27/10, 10:09:04.

⁴⁶ CD3, Hearings, 12/08/10, 10:00:34.

⁴⁷ CD3, Hearings, 1/19/11, 9:43:59; copy of COA Order Dismissing attached at Tab 3.

⁴⁸ CD3, Hearings, 1/19/11, 9:48:49 and 10/17/11, 9:45:01 – 9:47:13.

required is whether the new evidence “would with reasonable certainty change the verdict or ... would probably change the result if a new trial should be granted.” *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997) (quoting *Coots v. Commonwealth*, 418 S.W.2d 752 (Ky. 1967). “When newly discovered evidence is of such a nature that it is manifest to the conviction, substantially impacts the testimony of a material witness or would have induced a different conclusion by the jury had the evidence been heard, then assuredly, the interests of justice demand that a criminal defendant is entitled to have such evidence set before the court.” *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008).

Facts. Sometime after April 3, 2009, the Special Prosecutions Division of the Kentucky Attorney General’s Office forwarded Appellant’s counsel a copy of a letter from the Federal Bureau of Investigation (FBI) stating that supposedly scientific evidence regarding comparative bullet lead analysis⁴⁹ (CBLA) introduced at Appellant’s original 1998 guilt phase trial by a supposedly expert FBI agent was, in fact, scientifically unreliable.⁵⁰ Thus, Appellant learned for the first time in 2009 that false scientific evidence presented by a false expert was used to convince the jury of a scientific link between the murder of Frances Brady in Kentucky and the murder of Timothy Keeling in New Mexico, and to support Dennis Reese’s claim that Appellant committed both murders with the same gun. Comparative bullet lead analysis (CBLA) was the only evidence in 1998 providing a (supposedly) direct scientific link between Appellant and Brady’s murder. At this third re-sentencing trial, Appellant admitted for the first time that

⁴⁹ Comparative Bullet Lead Analysis (CBLA) is also sometimes referred to as Compositional Analysis of Bullet Lead (CABL). CBLA and CABL are one and the same.

⁵⁰ FBI letter to the Commonwealth, at Tab 4.

he accompanied Reese to Kentucky. But he steadfastly maintained that he was not present or involved in the murder of Tim Keeling, and that he did not kill Frank Brady.

Despite full awareness that the FBI has determined CBLA evidence is junk science and put Bullitt County on notice of that fact, the Commonwealth nonetheless read this third sentencing jury a summary of testimony by Richard Crum, the FBI firearms expert who testified that the bullets Appellant shot into Officer Bennett's cruiser in Kentucky were "identical" to bullets connected with Tim Keeling's murder in New Mexico.⁵¹

Argument. Without the CBLA evidence, the 1998 jury might not have convicted Appellant of murdering Brady. Indeed, without the **repeated** introduction of the CBLA evidence at this third sentencing trial, the 2011 jury would not have heard that the 1998 jury relied on "science" in convicting Appellant. The 2011 jury was not informed that the 1998 jury was misled by junk CBLA evidence. Instead, the 2011 jury was informed that Appellant murdered Tim Keeling and Frank Brady and was **fed the same false evidence** that the 1998 jury relied on in order to underscore a connection between the two murders. A new death sentence should not be allowed to stand "supported" on a guilt-phase verdict that is now severely undermined. A new death sentence "supported" by the same unreliable evidence that was fed to the 1998 jury cannot stand.

Comparative Bullet Lead Analysis (CBLA).

CBLA involves testing and comparing bullets or bullet fragments for seven elements. Before the FBI determined it was junk science, if the crime scene bullet and suspect bullet were analytically indistinguishable for each of the seven

⁵¹ CD3 Trial, 10/24/11, 3:26:47 – 3:34:05 and 10/25/11, 9:01:38 – 9:05:20.

elements, a purported CBLA "expert" would testify that the fragments and bullets probably came from the same "source."⁵²

FBI Special Agent Peel testified at Appellant's 1998 guilt-phase trial that if two lead bullets or fragments are found by the above method of comparison to have the same composition "that is what you would expect as if they were in the same box [of bullets]".⁵³ Peel compared bullet fragments found in Timothy Keeling in New Mexico with bullet fragments recovered from Frances Brady in Kentucky using the now-discredited seven-element comparison method. Peel concluded that the bullet fragments recovered from Keeling and Brady were so similar in elemental composition that "[i]t would make sense that all of these [compared bullet fragments] are from the same box [of bullets]".⁵⁴

CBLA is junk science.

The Director of the FBI Laboratory sent a letter to the Bullitt County Commonwealth's Attorney informing him that Peel's testimony was pure junk science:

A review of the testimony provided by the FBI Laboratory examiner on the subject of compositional analysis of bullet lead was conducted on a transcript of [the] testimony [in Appellant's trial.] The goal of the review was to determine if there was a suggestion by the examiner that a bullet fragment...was linked to a single box of ammunition without clarification that there would be a large number of other bullets or boxes of bullets that could also match those fragments....**Science does not support the statement or inference that bullets...or bullet fragments can be linked to a particular box of bullets....**We have since realized that the examiner failed to provide sufficient information to the jury to allow them to understand the number of bullets potentially produced from a single melt of lead....⁵⁵

⁵² National Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence*, National Academy Press, Washington D.C. (2004), pages 1-2.

⁵³ TE1-XVII, 2100.

⁵⁴ TE1-XVII, 2111.

⁵⁵ FBI Letter to Bullitt County Commonwealth's Attorney, at Tab 4.

After Appellant's direct appeal became final, the Kentucky Supreme Court ruled that CABL (CBLA) evidence is inadmissible in Kentucky:

The scientific study commissioned by the FBI Laboratory, itself, raised questions about the reliability and relevancy of CABL that were sufficiently serious to convince the Laboratory to discontinue forthwith CABL testing. If the FBI Laboratory that produced the CABL evidence now considers such evidence to be of insufficient reliability to justify continuing to produce it, a finding by the trial court that the evidence is both scientifically reliable and relevant would be clearly erroneous, *Miller v. Eldridge*, 146 S.W.3d at 917, and a finding that the evidence would be helpful to the jury would be an abuse of discretion. *Id.*

Ragland v. Commonwealth, 191 S.W.3d 569, 580 (Ky. 2006).

The *Ragland* court analyzed whether the introduction of CBLA evidence was harmless error under RCr 9.24 and found there was a substantial possibility that Ragland *would not have been convicted* without the admission of CBLA evidence. *Ragland*, 191 S.W.3d at 582.

Pseudoscientific evidence is not admissible. *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004) The letter from the FBI Laboratory to the Bullitt County Commonwealth's Attorney demonstrates that the CBLA evidence was pure pseudoscience that linked Appellant to the murder of Tim Keeling and bolstered Dennis Reese's credibility. The FBI letter substantially impacts the testimony of the Commonwealth's expert Special Agent Peel and presents a substantial possibility that Appellant's third death sentence is unreliable because Peel's testimony in 1998 was crucial to securing the underlying conviction relied on by the third jury in recommending death. *Bedingfield*, 260 S.W.3d at 810.

Apart from CBLA, the only other evidence linking Appellant to the Keeling

murder in 1998 was the testimony of Dennis Reese.⁵⁶ And Reese suffered serious credibility problems. He was a convicted felon. KRE 609. The jury knew he had powerful motivation to lie to convince the Commonwealth that Appellant was the principal villain. Reese—as well as Appellant—faced execution for murdering Frank Brady. Reese fooled no one by claiming he got nothing for his testimony against Appellant.⁵⁷ The jury knew Reese was rewarded when he accepted the Commonwealth's plea offer to life without possibility of parole for twenty five years.⁵⁸ But for his extreme cooperation and testimony against Appellant, Reese today would probably be on Kentucky's death row.

The CBLA evidence presented by the FBI expert as independent *scientific* evidence linking the murders of Timothy Keeling and Frances Brady to Appellant powerfully bolstered Reese's otherwise extremely weak credibility. The Commonwealth's closing argument trumpeted the CBLA evidence as proof that Reese was telling the truth when he accused Appellant of committing both murders:

You don't have the gun but you got the science. And science doesn't lie and **it connects the events [the murders of Timothy Keeling and Frances Brady] independent** of what Dennis Reese told you of the execution murder of Frances Brady. (emphasis added).⁵⁹

See also *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988). (prejudice resulted when the prosecution placed significant weight on expert witness's powerful, undisputed and unequivocal testimony). A new trial is required because an "aura of special reliability and trustworthiness" permeated the expert's testimony. *Hester v. Commonwealth*, 734 S.W.2d

⁵⁶ The CBLA evidence was the only evidence presented as irrefutable "science." Apart from Reese's self-serving testimony, only the CBLA evidence tied Appellant to the Keeling murder.

⁵⁷ TE1-X, 1328.

⁵⁸ TE1-X, 1326.

⁵⁹ Prosecutor Closing Argument, TE1-XXIV, 3058.

457 (Ky. 1987); *Thompson v. Commonwealth*, 177 S.W.3d 782, 786 (Ky. 2005) (jurors are undoubtedly greatly influenced by expert witness testimony).

This third jury was instructed that it could recommend a death sentence by relying on the fact that Appellant was guilty of murdering Frank Brady *as determined by the 1998 jury*. But the 1998 guilty verdict was based significantly on the false CBLA evidence. In addition, the same false evidence was presented to the 2011 jury. Thus the false CBLA evidence unquestionably contributed to this third death verdict.

This Court now knows CBLA evidence is too unreliable to be admissible. *Ragland, supra*. The third sentencing jury was **not** informed that the 1998 jury was misled by junk science that only *supposedly* connected him to Tim Keeling's murder. Without junk CBLA evidence, the 1998 jury would have had nothing but Dennis Reese's highly suspect word that Appellant murdered Tim Keeling. *Ragland* requires a complete new trial.

The 1998 guilty verdict should not be considered law of the case because the controlling law has changed:

The law of the case doctrine does not apply where controlling law changes in the interim, and the issue is not ripe until the change in controlling law occurs; otherwise, '[a]pplication of the law of the case doctrine would require every defendant and every prosecutor to immediately challenge every aspect of the law involved in the case or forever be denied relief.'

Estep v. Commonwealth, 64 S.W.3d 805, 812 (Ky. 2002), quoting *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky. 1994).

The evidence and arguments presented during the guilt phase of a capital trial can have a significant effect on the jurors' choice of sentence. *Strickler v. Greene*, 527 U.S. 263, 305 (1999) (Justice Souter, dissenting). This third sentencing jury should not have

been allowed to base a death sentence on a guilty verdict based on junk science. A new guilt-phase trial is required. The United States Supreme Court has declared that when a state court admits evidence that is “so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)); *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (bite mark evidence violated due process, and should have been excluded). “Where constitutional rights directly affecting the ascertainment of guilt are implicated,” evidence rules “may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (hearsay should not have been excluded). “Regardless of whether the proffered testimony comes within ... [Georgia's] hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause” *Green v. Georgia*, 442 U.S. 95, 97 (1979). A new trial is required.

2. A new guilt-phase trial is required due to significant changes in the law regarding KRE 404(b); the 1998 guilty verdict is fatally undermined.

Preservation. This issue is preserved.⁶⁰

Facts. Trial counsel filed a motion for a new trial due to changes in the law that affected the evidence introduced at the 1998 trial.⁶¹ At the final pretrial conference, counsel stated the motion dealt with the KRE 404(b) evidence that involved the Oklahoma murders, jail escape, and the kidnapping and murder of Keeling.⁶² Counsel argued: “it is our position there has been such a change in the law as it’s developed since

⁶⁰Motion for new guilt phase, TR3-III, 404-405; Pro se motion not to allow evidence related to Tim Keeling, TR3-IV, 541; CD3 Hearings, 10/17/11, 9:42:40-9:47:15.

⁶¹TR3-III, 404-405.

⁶²CD3 Hearings, 10/17/11, 9:45:15.

1998 that there may be a very valid question as to how much of that evidence would be allowed in if this case were tried today. So, under that theory we are asking for a new trial.”⁶³ The judge denied the motion.⁶⁴

Argument. Appellant challenges here the same prior bad acts that were challenged in his first appeal. *St. Clair*, 140 S.W.3d at 535-536. The trial judge from the 1998 trial admitted this evidence under both KRE 404(b) (1) and (2), which provides as follows:

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

In 2004, this Court affirmed the introduction of extensive details of four murders of which Appellant had been either convicted or accused in Oklahoma, extensive detail of his escape from an Oklahoma jail, extensive detail of the robbery of the Stephens family after the escape, and additional extensive detail regarding the quite-possibly-false story told by Dennis Reese regarding the kidnap and murder of Tim Keeling, and did not believe it was excessive or improper under KRE 404(b). *Id.* But the law on KRE 404(b) has changed so significantly from the time of this Court’s initial opinion in 2004 (*St. Clair I*) that a new trial is warranted. The law of the case doctrine does not apply where controlling law changes in the interim, and the issue is not ripe until the change in

⁶³CD3 Hearing, 10/17/11, 9:45:40-9:46:15.

⁶⁴CD3 Hearing, 10/17/11, 9:47:05.

controlling law occurs; otherwise, “[a]pplication of the law of the case doctrine would require every defendant and every prosecutor to immediately challenge every aspect of the law involved in the case or forever be denied relief.” *Estep v. Commonwealth*, 64 S.W.3d 805, 812 (Ky. 2002). Under *Estep*, this issue was not ripe before, but is ripe now. A new guilt-phase trial is required.

Appellant acknowledges that the underlying principles of prior bad acts law have not changed in the past eight years. The exclusionary and protective nature of the rule remains: “The fundamental purpose of KRE 404(b) is to prohibit unfair inferences against a defendant.” *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007). “[A]ny exceptions to the general rule that evidence of prior bad acts is inadmissible should be ‘closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.’” *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982)). But in 2004, shortly after *St. Clair I*, this Court held that **KRE 404(b) is a rule of general exclusion** with only certain specific exceptions. *Sherroan v. Commonwealth*, 142 S. W. 3d 7 (Ky. 2004).

While this fundamental principle is easy to state, it has been hard to apply. This Court has described prior bad acts analysis as “murky waters,” acknowledging the “difficult” nature of the 404(b) process. *Clark*, 223 S.W.3d at 96 (referring specifically to evaluating a defendant’s prior sexual conduct to determine whether it qualifies under the modus operandi exception). This led to early opinions that were “somewhat scattered.” *Id.*, (quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992)). But an analysis of this Court’s cases since 2004 reveals that this Court has been engaged in a

systematic clarifying and reaffirming of the exclusionary nature of the rule. The doctrines of the modus operandi exception and the inextricably intertwined exception display this exclusionary clarification most clearly.

“Modus operandi” has been significantly clarified.

This Court has significantly clarified the modus operandi exception since *St. Clair I*. For example, this Court in *Clark* reversed because introduction of testimony from a prior victim of an offense that occurred 20 years before the charges at issue did not qualify under the modus operandi exception. *Clark*, 223 S.W.3d at 101. There have also been significant reversals in other sexual offense cases. *See, Woodlee v. Commonwealth*, 306 S.W.3d 461 (Ky. 2010); *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky. 2006); *Dickerson v. Commonwealth*, 174 S.W.3d 451, 468-470 (Ky. 2005). And reversals have not been limited to sex cases. This Court recently reversed a drug trafficking conviction, ruling that prior drug sales to an informant were not admissible modus operandi evidence. *Graves v. Commonwealth*, 2012 WL 5285699 (Ky. 2012).

“Significantly intertwined” has also been clarified.

This Court has also significantly clarified the meaning of the catch-all phrase “inextricably intertwined.” Again, the Court reaffirmed the basic rule: “The key to understanding this exception is the word inextricably. The exception relates only to evidence that must come in because it is so interwoven with the evidence of the crime charged that its introduction is unavoidable.” *Major v. Commonwealth*, 177 S.W.3d 700, 707 (Ky. 2005) (quoting *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1993)). However, the cases after *St. Clair I* clarify the “significantly intertwined” doctrine in a way that renders it much more exclusionary. In doing so, this Court expressed the

concern that this exception had been threatening the overriding object of KRE 404(b) to protect a defendant from the inherent prejudice of other crimes evidence:

In practice, . . . this expanded idea of contextual relevance often paves the way to prove acts that are anything but inseparable [from] the charged crime, and this label can easily become a catchall for admitting other acts that are far more prejudicial to the defendant than useful in determining guilt of the charged offense.

Metcalf v. Commonwealth, 158 S.W.3d 740, 744 (Ky. 2005) (citations and quotations omitted).

The Court's intricate new analysis of the inextricably intertwined exception has led it to reverse cases where the prosecution provided excessive prior bad acts evidence in the guise of providing context. In *Major*, testimony that the defendant sexually abused his daughter after his wife disappeared was held not inextricably intertwined with facts related to the prosecution for his wife's murder. 177 S.W.3d at 707. In *Metcalf*, the factual circumstances of other allegations of sexual abuse by other step-daughters was not inextricably intertwined with the sex offenses for which the defendant was being tried. 158 S.W.3d at 743-745. And in *Graves, supra*, the similarities were not so peculiar or distinctive as to create a unique m.o. and simply followed the same pattern of facts involved in any routine controlled drug buy.

The strong trend of this Court's decisions since 2004 has been an exclusionary clarification of the modus operandi and inextricably intertwined exceptions. Of course not every case since 2004 involving prior bad acts has been reversed. This Court still affirms the introduction of prior bad acts evidence when the prosecution has made the proper showing. *E.g., Colvard v. Commonwealth*, 309 S.W.3d 239, 250-251 (Ky. 2010); *Harp v. Commonwealth*, 266 S.W.3d 813, 822-823 (Ky. 2008); *Epperson v.*

Commonwealth, 197 S.W.3d 46, 53-54 (Ky. 2006). But the definite trend of exclusionary clarification of KRE 404(b) evidence displays this Court's increasing resolve to reverse cases where the evidence fails to meet the high standard for admissibility required by KRE 404(b).

The Court's trend of exclusionary clarification is not limited to the modus operandi and inextricably intertwined exceptions. Since 2004, this Court has also reversed 404(b) cases for other reasons. In a prosecution for various sex offenses, this Court reversed when the prosecution introduced evidence of prior marijuana use, possession of pornography, unemployment, and poverty. No KRE 404(b) exception applied, and the testimony constituted inadmissible character evidence. *Chavies v. Commonwealth*, 374 S.W.3d 313, 321 (Ky. 2012). In another case, introduction of evidence that a defendant assaulted his former wife was held inadmissible under the motive and intent exceptions in an assault prosecution involving the defendant's current wife. *Driver v. Commonwealth*, 361 S.W.3d 877 (Ky. 2012).

This trend began shortly after *St. Clair I*, when various types of prior bad acts evidence were held inadmissible to prove the charge of felon in possession of a handgun, including testimony that defendant was going to shoot a witness, testimony that defendant possessed a shotgun and bullets, and an officer's reference to a sodomy case report. The Court decided that this evidence qualified under no KRE 404(b) exception, was irrelevant, and was offered only for its prejudicial effect. *Dickerson v. Commonwealth*, 174 S.W.3d 451, 464-465 (Ky. 2005). In another case, a prosecution for taking a naked picture of a minor, this Court held that testimony on rebuttal from three witnesses that the defendant had encouraged them to undress 20 years previously was

inadmissible to prove the defendant's motive of homosexual voyeurism. *Purcell v. Commonwealth*, 149 S.W.3d 382, 399-401 (Ky. 2004) (overruled on other grounds by *Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010)).

Since 2004, this Court has found error in still other cases where it has affirmed convictions by applying the harmless error rule. An officer's testimony that he was familiar with the defendant was held an impermissible reference to prior bad acts, but harmless because of vast evidence provided by multiple witnesses. *Wiley v. Commonwealth*, 348 S.W.3d 570, 581 (Ky. 2010). Evidence that a defendant possessed a sawed-off shotgun violated KRE 404(b) in a prosecution of various methamphetamine related offenses, but this Court found it harmless because the testimony lasted only a few minutes of a four day trial. *Shemwell v. Commonwealth*, 294 S.W.3d 430, 435 (Ky. 2009).

The 1998 prior bad acts evidence did not qualify as Appellant's m.o.

None of the prior bad acts testimony admitted at Appellant's trial in 1998 qualifies under this Court's current understanding of the modus operandi exception. *Clark, supra*; *Graves, supra*. The Court's current analysis focuses not on similar elements of the offenses, but on the high degree of factual similarity among the offenses. Appellant's prior murders lack this factual similarity. A gun is a deadly weapon commonly used in murders. No signature factual event connects these murders to qualify their introduction under the modus operandi exception. The Oklahoma murders involved people Appellant knew that had harmed his family and/or rival drug dealers who were threatening to kill Appellant. By contrast, Brady was a total stranger with no history of harming or threatening Appellant. He was approached randomly, because the rest area

was relatively secluded. Keeling —assuming Appellant had anything to do with his murder--was also a complete stranger, approached at a grocery store, a public place. Keeling was approached because his vehicle had a for sale sign, and he would therefore not be suspicious if someone stopped to talk with him. Critically, Appellant had no m.o. of harming people in connection with taking their trucks, and no m.o. of leaving bodies in secluded places until he met Reese. But Reese had **that exact m.o.** Before he ever met Appellant, Reese beat and choked a nurse to death, **took her new pickup truck** and left her dead body **in an isolated area.**⁶⁵ The Keeling evidence should have been excluded in 2004 because it demonstrated **Reese's** m.o., not Appellant's, and also because it was based entirely on Reese's self-motivated word. There was no preponderance of proof that Appellant committed the prior act involving Tim Keeling. KRE 104, *Bell v.*

Commonwealth, 875 S.W.2d 882, 890 (Ky. 1994); see also *Huddleston v. United States*, 485 U.S. 681 (1988).

The 1998 prior bad acts evidence was not inextricably intertwined.

Likewise, the prior bad acts were not inextricably intertwined. *Major, supra*. What happened in Oklahoma, Colorado, New Mexico, Texas, and Louisiana was not so interwoven with what happened in Kentucky that it would be unavoidable to prosecute Appellant for the murder of Brady without referencing what occurred in five other states. The fear expressed in *Metcalf* that an expanded idea of contextual relevance would “pave the way” to prove acts that are “anything but inseparable” became reality in Appellant's case. This crime spree evidence was far more prejudicial to Appellant than useful to the jury for determining his guilt with respect to Brady. The prior bad acts were “anything

⁶⁵ See Court Exhibit file, Defense Ex. #1 from Dennis Reese's prior murder file, Affidavit for Search Warrant.

but inseparable [from] the charged crime.” *Metcalf*, 158 S.W.3d at 744.

The exclusionary clarification of this Court’s KRE 404(b) jurisprudence since 2004 supports reversing Appellant’s case for a new guilt phase trial to proceed without the prior bad acts evidence. The Oklahoma murder convictions, the jail break, the Stephens’ confrontation, and the kidnapping and murder of Keeling would have been **inadmissible** had the guilt phase trial occurred in 2011. This Court cannot say with fair assurance that the 1998 jury was not substantially swayed by this evidence to impose the instant death sentence. The harmless error rule does not apply. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009); *Kotteakos v. United States*, 328 U.S.750 (1946).

The massive introduction of improper KRE 404(b) evidence at Appellant’s 1998 trial can now be seen as so fundamentally unfair that it violated 5th and 14th Amendment due process. “Where constitutional rights directly affecting the ascertainment of guilt are implicated,” evidence rules “may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); *cf.*, *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (bite mark evidence violated due process, and should have been excluded). Allowing the 1998 404(b) evidence to support this death sentence is “so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)).

This Court has reversed its position regarding 404(b) evidence so thoroughly since 2004 that Appellant’s conviction is fatally undermined. Just as in *Johnson v.*

Mississippi, 486 U.S. 578, 585 (1988) the Supreme Court reversed a death sentence on 8th Amendment grounds due to the reversal of a prior conviction supporting Mr.

Johnson's death sentence, this Court should reverse Appellant's underlying conviction and remand for a new guilt-phase trial because of the massive reversal in 404(b) law.

Appellant's case should be reversed and remanded for a new guilt phase and penalty trial where this prior bad act evidence is excluded.

3. A new guilt-phase trial is required because an impermissibly suggestive identification violated Appellant's right to due process.

Preservation. This issue is not preserved.⁶⁶

Facts. On Sunday, October 6, 1991, Martin Comely⁶⁷ was at a food mart and gas station in Lebanon Junction about 5:45 p.m. As Comely walked in the store, he passed a man leaving the store. Comely described that man as slender, 140 pounds, brown hair, no glasses, full bushy mustache, and with a tattoo on his right forearm.⁶⁸ From inside the store, Comely watched the man walk back to his truck. Another man was leaning on the hood. Comely described the other man as stocky, brown hair, no glasses, and no facial hair.⁶⁹ Comely recognized the two men from a police report on Monday night. He reported this to the police on Tuesday.⁷⁰ The police did not ask Comely to view anyone in a lineup. The police showed him two pictures, and Comely described them as the suspects.⁷¹ Comely identified Appellant as the man standing by the truck.⁷²

⁶⁶This issue has not been raised in a previous appeal.

⁶⁷The prosecutor read a summary of his testimony.

⁶⁸CD3 Trial, 10/24/11, 11:22:45 - 11:23:50.

⁶⁹CD3 Trial, 10/24/11, 11:23:50..

⁷⁰CD3 Trial, 10/24/11, 11:25:00.

⁷¹CD3 Trial, 10/24/11, 11:26:48.

⁷²CD3 Trial, 10/24/11, 11:25:20.

Argument. That suggestive identifications deprive defendants of due process is well established. The U.S. Supreme Court recognizes that an identification procedure might be “so unnecessarily suggestive and conducive to irreparable mistaken identification” as to result in a denial of due process of law. *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (overruled on other grounds in *Griffith v. Kentucky*, 479 U.S. 314 (1987)); see also, *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). In *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the Supreme Court stated “[i]t is the likelihood of misidentification which violates a defendant’s right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification.” If unnecessarily suggestive circumstances were not used to obtain the identification, then “the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification.” *Perry v. New Hampshire*, 132 S.Ct. 716, 730 (2012).

An unreliable identification based on a suggestive confrontation hinders justice. “A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). In *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977), the Supreme Court emphasized the concept of reliability to protect against this risk: “reliability is the linchpin in determining the admissibility of identification testimony.” This Court recognized these principles in *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985). The U.S. Supreme Court has adopted a two-step analysis for determining the admissibility of identification evidence.

First, the defendant must prove the identification procedure was impermissibly suggestive. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. The police should not in any manner or method suggest to the witness who the police have targeted as the suspect. To illustrate, “a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.” *United States v. Brownlee*, 454 F.3d 131, 138 (3rd Cir. 2006). Also, “there is no question that the display . . . of a single mug shot of each [defendant] unaccompanied by any other pictures, was unnecessarily suggestive.” *Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978). In Appellant’s case, the police showed Comely two pictures, presumably one of Appellant and one of Dennis Reese. These pictures were apparently mug shots.⁷³ Such an identification was unnecessarily suggestive.

Second, the court must determine whether, under the totality of the circumstances, the testimony was nevertheless reliable. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. The *Biggers* test was incorporated into the factors this Court set out in *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995) to determine the suggestiveness of an identification. The factors are as follows: 1) opportunity to view, 2) witness’ degree of attention, 3) accuracy of prior descriptions, 4) level of certainty at confrontation, and 5) time between the crime and the confrontation.

Comely’s testimony lacked reliability. A review of the five *Biggers* factors establishes this. First, Comely had a limited opportunity to view Appellant. While the first man passed by Comely as they walked through the doors, Comely never observed

⁷³ Appellant’s mug shot is in the Court exhibit file, marked Commonwealth’s #2. No other photo of Appellant appears in the record. Dennis Reese’s mug shot is also in the Court exhibit file, marked Commonwealth’s #10.

the man by the truck at that close range. Second, the man he passed in the door clearly caught Comely's attention. This rendered the man by the truck an afterthought. Third, all of Comely's pretrial identifications depended on the police. Comely saw the pictures in the police report 24 hours after the event, on Monday. He identified the two pictures the police showed him on Tuesday. Most likely, these identifications involved the same mug shots. That the prior descriptions were similar should not be surprising. Fourth, while the summary of Comely's testimony indicated he identified Appellant before the police station, his certainty proves to be unconvincing. He never had the opportunity to express anything besides certainty because of seeing the same pictures. Fifth, Comely's identification was not immediate. Rather, the identifications were made over the next couple of days, and they resulted from police suggestion. Any television and/or newspaper report indicated the police were looking for the men in the pictures. Comely then identified the men in the pictures. This analysis of the *Biggers* factors establishes that the impermissibly suggestive identification was also unreliable.

The police impermissibly suggested Comely's identification of Appellant. The totality of the circumstances rendered the identification unreliable. Thus, introduction of Comely's identification of Appellant violated his right to Due Process under the 14th Amendment. *Biggers*, 409 U.S. 188; *Braithwaite*, 432 U.S. 98. Therefore, this Court should reverse Appellant's conviction and order suppression of Comely's identification.

Appellant's jury was instructed to consider that Appellant had been found guilty of murdering Frank Brady by a prior jury and told to consider not only the "additional evidence" presented at the new sentencing trial but also the guilt-phase "evidence" and the "facts and circumstances of the particular offense of which he has been found guilty"

in fixing Appellant's punishment.⁷⁴ It is well-known that "... the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence." *Strickler v. Greene*, 527 U.S. 263, 305 (1999) (Justice Souter, dissenting). If a new guilt-phase trial is ordered, Comely's identification of Appellant should be suppressed and not allowed as evidence.

VOIR DIRE AND JUROR ISSUES

4. A new sentencing trial is required because the court failed to follow this Court's mandatory rules for voir dire.

Preservation. This issue is unpreserved. Regarding voir dire, the court asked if counsel would like to follow the "rules" or the "Jefferson County method."⁷⁵ The Commonwealth said, "we all agreed on the Jefferson County way; it's a lot easier."⁷⁶ Counsel for Appellant said he preferred the Jefferson County method. *Id.* The court commented that only 10 out of 500 cases were conducted according to the "appropriate method," and it would need a "waiver on that from Mr. St. Clair as well."⁷⁷ No verbal waiver by Appellant was obtained at the hearing, and there is no written waiver by Appellant in the record. Thus, the court's Order of March 3, 2011, stating that along with his counsel Appellant "personally" agreed to use the "procedures generally used in Jefferson Circuit Court" is incorrect.⁷⁸ Appellant did not personally waive this Court's procedural rules on voir dire. Moreover, compliance with the Administrative Procedures of the Court of Justice is mandatory and not a matter that can be waived whether by the parties, counsel, or the court.

⁷⁴ Jury Instructions, TR3-IV, 552-554.

⁷⁵ CD3, Hearings, 3/02/11, 9:48:55.

⁷⁶ CD3, Hearings, 7/26/11, 9:31:32.

⁷⁷ CD3, Hearings, 3/02/11, 9:49:50.

⁷⁸ Order on Status Conference Held March 2, 2011, TR3-I, 24-27, at Tab 5.

Standard of Review. The standard of review for issues of law is *de novo*. *Fugett v. Commonwealth*, 250 S.W.3d 604, 616 (Ky. 2008) (questions of law are reviewed *de novo*). This Court should review the trial court's failure to comply with this Court's procedural rules under RCr 10.26 as palpable error.

Facts. On October 3, 2011, the court and parties agreed to summon 100 veniremen for Appellant's sentencing trial.⁷⁹ At the last pre-trial conference on Monday, October 17, 2011, the court stated that individual voir dire would occur October 18 - 21, and group voir dire would begin Friday, October 21, 2011, at 1:30 p.m.⁸⁰ On October 18, the court divided 100 potential jurors into 14 groups of approximately six jurors each with instructions when to return.⁸¹ At 1:30 p.m. on October 21 after the conclusion of individual voir dire, five potential jurors were excused, and the remaining group of up to 80 jurors was convened for group voir dire.⁸² The court room was so packed with jurors that the trial court jokingly inquired, "Do you all feel like sardines out there? We have way too many. We're going to seat 14."⁸³ The court urged the roomful of jurors to speak up when they answered questions, recognizing the danger that with such a large group a juror whose response was overlooked might "go under the radar and get selected."⁸⁴ With potential jurors filling both sides of the court room, the court told them they would all have to "speak up." "Keep your voices loud and clear. You gotta project!"⁸⁵ The court further told the jurors that because the prosecution table was "closer to you" that "they

⁷⁹ CD3 Hearings, 10/3/11, 11:29:14.

⁸⁰ CD3 Voir Dire, 10/17/11, 10:18:51-10:21:36.

⁸¹ CD3 Voir Dire, 10/18/11, 10:17:25 - 10:40:07.

⁸² CD3 Voir Dire, 10/21/11, 1:30:14.

⁸³ CD3 Voir Dire, 10/21/11, 1:39:36 - 1:40:20.

⁸⁴ CD3 Voir Dire, 10/21/11, 1:41:18.

⁸⁵ CD3 Voir Dire, 10/21/11, 1:41:54.

will be able to hear your answers better than the defense.”⁸⁶

Argument. This Court’s rules on jury selection must be followed without deviation and regardless of prejudice:

It is in the interest of justice that the statutes and rules for jury selection be closely followed, and that no substantial deviation be allowed, regardless of prejudice. The matter of jury selection is too important a part of our judicial system to permit variations, from one court to another, in compliance with controlling statutes.

Allen v. Commonwealth, 596 S.W.2d 21, 22 (Ky. 1979). By purposely ignoring this Court’s rules of procedure and employing the “Jefferson County method” of voir dire in this Bullitt County capital case, the court violated the mandatory provisions of II ADPRO Sections 1 and 10. Kentucky’s RCr 9.30(2) mandates that “[t]he jury selection process shall be conducted in accordance with Part Two (II) of the Administrative Procedures of the Court of Justice.” The terms of II ADPRO Section I and relevant portions of Section 10 read as follows:

Section 1. Definitions

As used in these sections, unless the context otherwise requires:

- (1) “Box” means the receptacle in which are placed the cards with identifying numbers representing the names of those assigned to a jury panel, from which a grand jury or petit jury shall be chosen.
- (2) “Court” means a circuit or district court of this commonwealth and includes any
- (3) “Identifying number” means the number assigned on the randomized jury list to each name in the jury panel.
- (4) “Jury panel” means the group of prospective jurors who are summoned to appear on a stated day and from which a grand jury or petit jury will be chosen.
- (5) “Jury period” and “jury period of service” means the time period for which a group of persons is summoned to jury service.
- (6) “Name” includes an identifying number.
- (7) “Randomized jury list” means the randomized computer generated list of prospective jurors taken from all county registered voters and all persons over the age of eighteen (18) with valid drivers’ licenses issued in the county.

⁸⁶ CD3 Voir Dire, 10/21/11, 1:42:20.

Section 10. Selection of Petit and Grand Jury.

- (1) To select a grand jury from a jury panel, the judge or designee shall:
 - a. Take identifying numbers from those assigned on the randomized jury list;
 - b. Deposit in a box numbered cards bearing the same numbers as those assigned to the panel;
 - c. Draw the required number of cards, dependent on the number of jurors to be chosen, from the box and record the number of each card as it is drawn.
- (2) The persons whose numbers have been drawn shall constitute the grand jury or petit jury as the case may be, unless excused or removed by challenge.
- (3) As prospective jurors are excused or challenged, additional cards shall be drawn, one for each juror required, until all of the cards have been exhausted.

[II ADPRO Section 10, subsections (4) through (9) are omitted]

Read together, Part II ADPRO Sections 1 and 10 require that group voir dire questioning must be addressed not to a sardine-packed courtroom, but before a sub-set of potential jurors equal to the number of the actual jury to be chosen. In this case, the proper number of potential jurors to be questioned at one time was 14.⁸⁷ This requirement is created by the interplay between Part II ADPRO Section 10(1) (c) and Section 10(2). Section 10(1) (c) states that a petit jury must be selected by drawing the “required number of cards, **dependent on the number of jurors to be chosen....**” (emphasis added). Section 10(2) states “[t]he persons whose numbers have been drawn **shall constitute the grand jury or petit jury...unless excused or removed by challenge.**” (emphasis added).

If II ADPRO Section 1 and 10 were followed expressly as just described, there would have been a much smaller group –just 14 at one time--for group questioning. Hardship and medical excusals could still have been handled initially with the entire panel, as done here. The timing of individual voir dire is not addressed in the rule. Conducting individual voir dire after hardship and medical excusals (as here) gets it out

⁸⁷ “We’re going to seat 14.” CD3 Voir Dire, 10/21/11, 1:40:03.

of the way prior to group questioning. But after individual voir dire is complete, the rule requires that all unexcused panel members should re-convene in court as a group and that 14 should be chosen from that group for group voir dire questioning.

Under the express terms of II ADPRO Sections 1 and 10, for a petit jury of 12 with two alternates, like the jury here, 14 veniremen should have been chosen randomly from the entire panel and seated in the jury box for general questioning. The 14 should have been seated and questioned as a separate group --equally audible and visible to both the prosecution and the defense--while the other panel members remained in court listening to the questions. Individual prospective jurors from the 14 could have been called to the bench privately during group questioning, as needed. After each challenge for cause (handled at the bench), under II ADPRO Section 10(3), for each juror excused, a new juror would be randomly added to the group of 14 from the greater panel.

Under the rule, at the point when neither side desired to strike anyone from the currently-sitting 14 for cause, the parties would have taken turns making peremptory challenges. These would have occurred at the bench. Each excused juror would be replaced, one by one, until both sides "passed." If in this process the defense was forced to exercise all its peremptory challenges, it would designate any additional juror it would have struck. The 14 jurors sitting at this point would become the jury.

Requiring Appellant to address group voir dire questions to the entire venire panel of 100 potential jurors packed in the court room like sardines violated Kentucky's Administrative Procedures of the Court of Justice, Part II (II ADPRO) Sections 1 and 10, and prejudiced the defendant by making it more difficult for him to adequately see and hear jurors' responses than it was for the prosecution.

Under II ADPRO Sections 1 and 10, the group selected for questioning should have been no greater than 14. *Warren* and *Allen* require this Court's rules to be followed without compromise and without proof of prejudice.

This Court should not hold that litigants or the trial court may disregard court rules and agree on their own rules. This was a substantial deviation from the Court's rules. Questioning a group of 100 is substantially different from questioning a group of 14. No prejudice need be shown. *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky. 1980) (no need to show prejudice caused by substantial deviation in jury selection procedure).

The violation of Kentucky's Administrative Procedures of the Court of Justice also violated Appellant's right to due process. See *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Gonzalez v. Wong*, 667 F.3d 965, 2011 WL 6061514 (9th Cir. 2011) (discussing when a state law violation also violates due process). Retrial is required with voir dire conducted in compliance with II ADPRO Sections 1 and 10, as interpreted by this Court, with a group no larger than the size of the jury that will sit, including alternates.

5. Limiting voir dire regarding the lowest penalties violated equal protection and the 6th and 14th Amendment right to an impartial jury and intelligent peremptories.

Preservation. This issue is preserved. During individual voir dire, Appellant's counsel asked a potential juror whether—knowing that Appellant had been convicted of intentional murder—the juror might “seriously consider the low end of 20 to 50 years as being too lenient.” The court sustained the Commonwealth's objection by saying that Appellant could ask only if the juror could consider “the range,” not “the low end” of the

range. Defense counsel then asked if the juror could consider the [entire 20 to 50-year] range and “seriously weigh all these options,” and the juror responded affirmatively.⁸⁸ Appellant also objected when the judge dismissed a juror without allowing the defense to explain that an aggravator might mean only a prior criminal record, arguing that this juror might have been willing to consider the lower range of penalties. Again, the judge did not allow counsel to inquire further.⁸⁹

Argument. The court’s curtailing of voir dire regarding the lowest sentences posed two dangers, 1) the danger of including jurors who would not consider the lowest term of years sentence, and 2) the danger that a juror was excluded who might have been willing to consider the lowest term of years. Kentucky has long recognized the “right of inquiry” in voir dire. Justice Liebson stated in his concurrence in *Miracle v. Commonwealth*, 646 S.W.2d 720 (Ky. 1983), that as long as the questions do not instruct the jury on the lawyer’s view of the law or the facts, questioning should be allowed to elicit “a reasonable basis for intelligently exercising peremptory challenges”:

... inquiry properly phrased to elicit from jurors facts known or opinions held by the jurors which reasonably could be expected to influence their decision is not only permissible, it is desirable. It is needed to answer the question of whether a juror is so prejudiced as to be disqualified for cause, and to give counsel a reasonable basis for intelligently exercising peremptory challenges. The right to peremptory challenges is meaningless if effective voir dire is denied.

Miracle v. Commonwealth, 646 S.W.2d at 723 (Justice Liebson’s concurrence).

Allowing the Commonwealth full voir dire while restricting the defense violated equal protection.

By refusing to allow Appellant to examine the venire as closely on attitudes

⁸⁸ CD3, Voir Dire, 10/19/12, 2:19:30-2:22:30.

⁸⁹ CD3 Voir Dire, 10/21/11, 9:51:33.

regarding the lowest sentence as the Commonwealth had examined regarding the highest sentence, the court violated equal protection by favoring one litigant (the Commonwealth) over another (the defense). *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (litigation rights cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause).

This discriminatory restriction of voir dire on the lowest sentences prejudiced Appellant by leaving him in the dark for purposes of exercising challenges for cause and peremptories. The court allowed broad penetrating questioning to ensure jurors' willingness to recommend the *severest* penalty but refused to allow any questioning at all about the most lenient penalty. This violated equal protection under *Lindsey v. Normet*, *supra*.

Limitations on voir dire violated the 6th and 14th Amendments.

Limiting voir dire on the lowest penalties also violated Appellant's right to an impartial jury under the 6th and 14th Amendments. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Trial court discretion in conducting voir dire is "not boundless." *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005). Failure to allow voir dire questioning can render a trial fundamentally unfair in violation of the 6th and 14th Amendments of the United States Constitution. *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991). This occurs when responses to precluded questions could have provided the basis for a peremptory challenge or a challenge for cause. *Hayes*, 175 S.W.3d at 583. Voir dire examination "must be conducted in a manner that allows the parties to effectively and intelligently exercise their right to peremptory challenges and

challenges for cause.” *Hayes*, 175 S.W.3d at 584.

According to *Morgan*, although there is no “catechism for voir dire,” the defendant’s right to an impartial jury requires “adequate voir dire to identify unqualified jurors.” 504 U.S. at 729. By constricting voir dire on the non-death penalties to allow just one generalized question covering the entire range, the court effectively reduced the voir dire to the bare question whether the jury could follow the law and be fair, in violation of *Morgan*. *Id.*, at 735-36.

The questions Appellant sought to ask were not an attempt to inculcate a juror with the lawyer’s view of facts or law. The line of questions has been routinely allowed in other death cases, and was permissible as part of the “right of inquiry.” The court forbade Appellant from asking whether a juror would consider the lower end of the 20 to 50 range, including specifically a 20-year sentence. This denied his right recognized by this Court in *Miracle* to “full inquiry” in order to intelligently exercise peremptory challenges. The court’s only approved form of the question—whether jurors could consider the range of penalties *from 20 to 50 years*—allowed potential jurors to respond affirmatively if they were thinking only of the higher end of the range, or only of a 50-year sentence. Potential jurors could also have thought that a sentence of “20 to 50 years” meant that a prisoner would remain liable to serve the entire 50 years depending on his behavior in prison or on the circumstances of the crime. This was not explained during voir dire, and the court’s decision to prohibit more focused questioning left it ambiguous.

There are unquestionably jurors who will affirm willingness to consider an entire range of penalties, but under more focused questioning will admit that they cannot

consider a sentence as low as twenty years:

Upon questioning by the trial judge, [Juror No. 1] stated that he could consider the entire range of penalties and would not automatically exclude either the minimum or the maximum penalties. He also responded affirmatively when asked by defense counsel whether he could consider imposition of the minimum penalty of twenty years upon conviction of intentional murder. However, when asked if he could consider imposition of the minimum penalty as punishment for *two* intentional murders, he stated that he could not do so.

Hodge v. Commonwealth, 17 S.W.3d 824, 836-37 (Ky. 2000). See also *Caudill v.*

Commonwealth, 120 S.W.3d 635, 655 (Ky. 2003), where this Court denied a challenge to voir dire because the defendant *was allowed* to ask the question that Appellant's counsel sought to ask:

Assume in this case that we get to the sentencing phase. That means that you've already found the defendant guilty of murder and an aggravating circumstance, like a burglary or a robbery or a rape or something like that. If that's the case, can you give a serious and honest consideration to a minimum sentence of twenty years?

Caudill v. Commonwealth, 120 S.W.3d 635, 655 (Ky. 2003). If granted a full, reasonable voir dire that provided more information, Appellant would have had a better chance to pick a jury that would have recommended LWOP25, straight life, or a term of 20 years. Appellant's right to equal protection under the 5th and 14th Amendments, his right to a fair and impartial jury, and his right to intelligent cause and peremptory challenges under the 6th, 8th, and 14th Amendments were violated. Retrial is required.

6. A new sentencing trial is required because jurors #15, 16, and 448 should have been struck for cause.

Preservation and Facts. This issue is unpreserved. While defense counsel did move to strike Juror #15 for cause, counsel did not set forth the names of other jurors he would have struck as required under *Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009). Counsel used one of his peremptory strikes on #15. As discussed below, Jurors

#16 and #448 were each moved to be struck for cause by defense, but the motions were denied. In the end, they were randomly struck, so no strikes were needed. *See* Court exhibit file, Sealed Juror Strikes.

After being told by defense counsel that this case dealt with an intentional murder, Juror #15, Ms. Hildebrand, stated that she would have trouble considering a term of years of 20-50.⁹⁰ Specifically, she testified as follows:

Juror #15: Oh, intentional, um, I'd have trouble with the 20-50, to be honest with you....giving it to him because, you know, I know a little bit about the time lapse. You know. The good time, bad time. I know a little bit of that, so I know how some of that works. ...I'd probably have trouble giving it to him, to be honest with you.

Juror #15 also stated she would have trouble considering mitigation evidence, as shown in the following exchange:

Defense Counsel: What about evidence that might be offered on behalf of the defendant, like he had a rough childhood or possibly abusive childhood. Would that be something that you'd be able to consider, in mitigation in terms of thinking about, 'Maybe I shouldn't give such a harsh punishment, I'll take a look, I'll be able to consider?'⁹¹

Juror #15: I'll take a look at it. You know, I'd look at it. I could probably consider it, but a lot of people have rough lives and not murdered people (laughing).

The motion to strike by the defense was overruled.⁹² Defense counsel used a peremptory strike on Juror 15. *See* Court exhibit file, Sealed Juror Strikes.

Juror #16, Ms. Sadderley, after initially stating she could consider a term of years, subsequently testified that she could not consider 20 to 50 years:

Defense Counsel: What is your view of the death penalty?⁹³

⁹⁰ CD3 Supp., 10/18/11, 13:38:02.

⁹¹ CD3 Supp., 10/18/11, 13:41:53.

⁹² CD3 Supp., 10/18/11, 13:43:50.

⁹³ CD3 Supp., 10/18/11, 13:50:10.

Juror #16: If you've done the crime, then you should pay the highest penalty for what you've done...If you've done the crime and have taken someone's life, you should pay for what you've done.

Defense Counsel: ...Knowing that [an intentional murder has taken place], can you, and when I say 'consider' a lot of meanings to consider, but to mull over, to seriously give thought to an intentional murder, could you really seriously give thought to 20 to 50 years, 20 years is the low end as an appropriate punishment for what I've described, an intentional murder?⁹⁴

Juror #16: No.

Defense Counsel: When you say you can't consider to 20 to 50 years is that a belief that's pretty firm with you?⁹⁵

Juror #16: Yes.

Juror #448, Mr. McDaris, testified that only certain penalties were appropriate for an intentional murder:

Commonwealth: Is there anything that jumps off the page at you as troublesome or you know it's not an option?⁹⁶

Juror #448: No.

Commonwealth: Have you ever had a conversation about the death penalty?

Juror #448: Yes.

Commonwealth: What do you think about the death penalty?

Juror #448: I'm all for it. I guarantee you if somebody killed a member of my family I'd be for the death penalty.

Commonwealth: Okay. All right. So does this mean that in every situation no matter what the circumstances involved if there's a murder involved should there be the death penalty?

⁹⁴ CD3 Supp., 10/18/11, 13:51:05.

⁹⁵ CD3 Supp., 10/18/11, 13:52:49.

⁹⁶ CD3 Voir Dire., 10/20/11, 12:16:40.

Juror #448: Not necessarily. If it's first-degree murder, I say definitely death penalty. Because first-degree murder or premeditated murder, I figure it wasn't an accident.

Commonwealth: We are talking about an intentional murder.

Juror #448: Then the death penalty is definitely on.

Commonwealth: It's on the list but is that the only option for you?

Juror #448: No that's not the only option, but it should definitely be on the list.

Commonwealth: Fair enough, it's on the list, but here's the thing, it's not the only thing on the list up here, is that the only thing on your list?

Juror #448: No.

Commonwealth: So you're willing to consider something less than death?

Juror #448: Not much less, 50 years maybe, or life without parole for 25 years, yeah.

While Juror #448 stated that he could consider 20 to 50 years, he liked 50 better.⁹⁷

Argument. A trial court bears the responsibility of removing prospective jurors who will not be able to follow the trial court's instructions or impartially evaluate the evidence. *Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992). A trial court's decision on whether to excuse a juror for cause will be reviewed for an abuse of discretion. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). Pursuant to RCr 9.36(1), a judge must excuse a juror for cause if there is a "reasonable ground to believe [the] prospective juror cannot render a fair and impartial verdict on the evidence." The true test of whether a juror should be stricken for cause is whether "the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004) (quoting *Mate v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994)).

⁹⁷ CD3 Voir Dire., 10/20/11, 12:20:45.

The trial court abused its discretion when it failed to strike Jurors #15, 16, and 448 for cause. Compounding this issue is the fact that defense counsel was prevented from asking jurors whether they could consider the minimum 20 year sentence. *See* Argument 5, *supra*. Nonetheless, Juror #15 should have been excused for cause because she would have trouble considering a prison term of 20 to 50 years, and she would have trouble considering mitigation evidence.

Similarly, Jurors #16 and #448, while they were ultimately randomly struck, were both adamantly in favor of the death penalty and would only pay lip service to the 20 to 50 year penalty range. Juror #16 plainly stated that she could not consider 20 to 50 years, and Juror #448 was unwilling to consider a sentence less than 50 years.

The fact that both jurors were improperly rehabilitated by the Commonwealth does not change their bias. *See Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991) (biased juror cannot be rehabilitated by a “magic question”). This Court, in *Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009), approved of the *Montgomery* holding, but held that the trial court’s failure to strike a juror for cause creates a presumption that the error is prejudicial only if the defense identifies on its strike sheet any additional jurors it would have struck. *Id.* at 854, citing *Shane*, 243 S.W.3d at 341 (Ky. 2007).

Since #16 and #446 were randomly struck and defense used a peremptory strike on #15, the Commonwealth will argue that any possible error was “effectively cured.” *Id.*, quoting *King v. Commonwealth*, 276 S.W.3d 270, 279 (Ky. 2009). However, the trial court’s failure to strike #15, #16, and #448 for cause created two points of prejudice: 1) it forced defense to use a peremptory strike on #15 instead of another juror; and 2) it left

two biased jurors in the pool, changing the composition of the pool – the jury pool was not random anymore. Accordingly, the trial court’s actions increased the likelihood that unqualified jurors sat on the case. And it increased the chance that Appellant did not have an impartial jury. 6th and 14th Amends., U.S. Const.; § 11, Ky. Const.; *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). *Gabbard* should be overruled. A reversal is required.

7. Juror #667’s right to equal protection under *Batson* was violated when he was excluded from jury service based on his socioeconomic status; retrial is required.

Facts. Juror #667’s part-time job shuttling cars at the airport didn’t “pay any benefits,” and he was “just barely making it.” The court expressly excused him on socioeconomic grounds, saying, “You need that money, right?”⁹⁸

Preservation. This issue should be considered partially preserved by Appellant’s *pro se* motion that his jurors should be paid at least “minimal wage” and his argument that a jury that was not adequately paid would be resentful and prejudiced against him.⁹⁹ The court called this a “good motion” and stated, “I agree 100%.” But the court then said “I think you are right, but I can’t do anything about it,” indicating the rule was “statutory.”¹⁰⁰

Batson allows preservation of juror discrimination claims by a three-step process: 1) challenger produces prima facie showing of purposeful discrimination; 2) opponent demonstrates neutral reason for the strike, 3) challenger meets burden of proving purposeful discrimination. *Batson*, 476 U.S. at 93-94. Appellant did not engage in the

⁹⁸ CD3 Voir Dire, 10/18/11. 9:46:40.

⁹⁹ TR3-II, 154-159; CD3 Hearings, 10/3/11; 11:32:01-11:35:00.

¹⁰⁰ CD3 Hearings, 10/3/11, 11:34:35.

three-step *Batson* process. But the record is clear both that the sole reason Juror #667 was excluded was his socioeconomic status and that no "neutral" reason could have been offered. A defendant is not required to make useless objections. *Commonwealth v. Davis*, 14 S.W.3d 9 (Ky.1999). In *Davis*, this Court held that objecting to proper jury instructions would have been futile because such an objection was certain to be overruled. *Id.* Engaging in the three-step *Batson* process would have been futile because the record is clear that the sole reason this juror was dismissed was socioeconomic. There is no possibility the Commonwealth could have produced a neutral reason.

Appellant's pro se motion expressly asked the court to **enable** low socioeconomic jurors to serve by adequately paying them, and that is the **opposite** of moving to exclude them. Low socioeconomic level jurors were people who shared at least some aspects of Appellant's impoverished life experience and who might have been more sympathetic to Appellant. Appellant effectively made the court aware that he was protesting socioeconomic discrimination against the jurors. Juror #667's socioeconomic status was **not** a neutral reason to excuse him. In this death case, further preservation should be waived.

Appellant also requests palpable error review under RCr 10.26 and reversal under *Batson* and *Gray v. Mississippi*, 481 U.S. 648, 666 (1987) (erroneous exclusion of qualified juror required automatic reversal) and Sec. 3 of the Kentucky Constitution. **Argument.** Juror #667 was excused from serving on Appellant's jury because of one reason only: due to his extreme low income. The court expressly excused Juror #667 because Kentucky's pay of \$5 a day and \$7.50 in expenses would have caused him an extreme hardship. A "wage" of five dollars a day is less than 63 cents an hour for an

eight-hour day. By contrast, federal minimum wage, which applies in Kentucky, has been \$7.25 an hour since July 24, 2009. 29 U.S.C. § 206(a) (1), as amended in 2007.

Excusal of low socioeconomic jurors like Juror #667 whose low income prevents them from accepting \$5 a day plus expenses occurs so routinely in the courts of Kentucky that it has become a state-wide systematic exclusion. Like the prosecution manual in *Batson v. Kentucky*, 476 U.S. 79 (1986) as modified by *Powers v. Ohio*, 499 U.S. 400 (1991), that prescribed systematic peremptory removal of all black jurors, \$5-a-day juror pay prescribed by KRS 29A.170 causes systematic exclusion of low-income Kentucky jurors. But to be clear, Appellant is not raising a fair-cross-section claim. Nor is he challenging the constitutionality of KRS 29A.170.

Appellant challenges the fact that Juror #667, a member of an identifiable socioeconomic group in Bullitt County and Kentucky, was excluded based on his membership in that group. According to official 2010 U.S. Census figures, 9.5 % of Bullitt County's population was "below poverty level" during the years 2006-2010.¹⁰¹ With a part-time minimum wage job, Juror #667 was undeniably a member of an identifiable group. This cannot be denied. The U. S. Supreme Court itself has recognized low income "daily wage earners" as a cognizable legal group. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

Under *Batson v. Kentucky*, 476 U.S. 79 (1986) as modified by *Powers v. Ohio*, 499 U.S. 400 (1991) a litigant need not prove that a discriminatory juror exclusion is systemic. *Batson* overruled *Swain v. Alabama*, 380 U.S. 202 (1965), which required proof of a "pattern" of systemic exclusion of racial minority jurors. *Batson* abolished the

¹⁰¹ <http://quickfacts.census.gov/qfd/states/21/21029.html>

“crippling burden” of proving systemic discrimination. *Id.* at 92-93. After *Batson* **no pattern needs to be shown** and “even a single invidiously discriminatory governmental act” violates equal protection and requires a new trial. *Id.* at 95. The clear evidence is that Juror #667 was excused from serving on Appellant’s jury solely because of his socioeconomic status. This is sufficient to require a new trial under *Batson*.

No matter how well-meaning the court may have intended it, excluding Juror #667 was an invidious, discriminatory, governmental act that violated both the federal and state constitutions. The U.S. Supreme Court has **defined** the act of excluding a citizen from jury service based on socioeconomic status as invidious discrimination. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). So-called “blue-ribbon” juries are strictly prohibited. *Glasser v. United States*, 315 U.S. 60 (1942) (superceded by FRE 104(a) on an unrelated issue). In addition, this Court’s Rule 4.300, Kentucky Code of Judicial Conduct, Canon 3, Section B(6) expressly prohibits courtroom bias based on “...**socioeconomic status**, against parties, witnesses, counsel, **or others....**” (emphasis added). “Others” certainly includes jurors.

Juror #667 was unquestionably excluded from jury service solely because of his socioeconomic status and for no other reason. And *Batson* protects jurors as well as litigants. Peremptorily excusing Juror #667 based on his socioeconomic group membership discriminated against him **as a juror**. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 618-619 (1991) (race-based exclusion violated equal protection rights of the challenged jurors). Criminal defendants may raise discrimination claims of improperly excluded jurors. *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Appellant here raises Juror #667’s claim under *Powers*.

Under Canon 3, *Thiel*, and *Batson*, the trial court violated Juror #667's equal protection rights when it excluded him from jury service based on his socioeconomic status. At the moment he was excluded Juror #667 stood before the court otherwise fully qualified. Had he been allowed to remain long enough to answer *Witherspoon-Witt* questions, Juror #667 could well have remained qualified, served on Appellant's jury, and voted for a sentence less than death. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (no automatic exclusion based on conscientious scruples or opposition to capital punishment); *Wainwright v. Witt*, 469 U.S. 412 (1985) (juror whose views would substantially impair performance of his duties may be excused).

The erroneous exclusion of Juror #667 at a time when he was otherwise fully qualified violated Appellant's rights under the 6th and 14th Amendments. Automatic reversal is required under *Gray v. Mississippi*, 481 U.S. 648, 666 (1987) (erroneous exclusion of qualified juror who may have voted for sentence less than death required automatic reversal). See also, *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (Kentucky's Constitution provides even greater protection than the 14th Amendment).

8. Forcing Appellant to trial before a jury paid less than minimum wage denied him due process and a fair and impartial jury.

Facts. As set out in Argument 7, above, jurors who served on Appellant's jury were paid \$5 a day, and \$7.50 in expenses for nine days of service from October 18 through October 28, 2011.

Preservation. This issue is preserved. Appellant moved *pro se* that the jurors should be paid at least minimum wage and argued that a jury that was not adequately paid

would be resentful and prejudiced against him.¹⁰² The court overruled his motion; thus, his argument is preserved that paying his jury less than minimum wage denied him a fair and impartial jury.

Standard of review. The standard of review for issues of law is *de novo*. *Fugett v. Commonwealth*, 250 S.W.3d 604, 616 (Ky. 2008) (questions of law are reviewed *de novo*).

Argument. Sitting as a member of Appellant's jury for nine days, watching and listening to witnesses, evidence, and arguments, and deciding difficult issues in a death penalty sentencing trial was unquestionably work. Because the Commonwealth caused and suffered it to occur and was completely aware it was occurring, it was "work" as defined by Kentucky law:

Mere knowledge by an employer of work done for him by another is sufficient to create the employment relation under KRS Chapter 337.

803 KAR 1:005.

Kentucky law follows federal minimum wage levels, and in 2011 under KRS 337.275 required employers to pay employees at least \$7.50 per hour for "work" performed for them. Minimum wage laws are designed to fix "... a floor below which wages could not fall [so] that individuals ... would be guaranteed an income on which one could maintain a minimum living standard and not find it necessary either to rely on Government assistance or to go without basic necessities" S.REP. No. 440, 95th Cong., 1st Sess. 2-3 (1977). The payment of minimum wage cannot be waived; it is public policy: It has been repeatedly held that parties themselves cannot contract to work for less than the minimum wage rate. "[T]he obligation of the employer to meet the

¹⁰² TR3-II, 154-159; CD3 Hearings, 10/3/11; 11:32:30-11:35:00.

minimum working conditions prescribed in the Act is statutory and a matter of general public policy, and cannot be waived or contracted away by individual employers or employees.” *Wirtz v. Leonard*, 317 F.2d 768, 769 (5th Cir. 1963) (quoting *Mitchell v. Turner*, 286 F.2d 104, 106 (5th Cir. 1960)) (emphasis added).

Jurors are even more essential to Kentucky’s criminal justice system than defense counsel. And there is case law holding that when defense counsel receives inadequate pay, **his client’s constitutional rights are violated**. *Martinez - Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (inadequate defense counsel pay is sufficient to establish ineffective assistance of counsel); *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (bid system caused defense attorneys to be so overworked that it violated indigent defendant’s right to due process and right to counsel); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (public defender workloads created rebuttable presumption of ineffective assistance of counsel); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004) (defendants deprived of constitutional right to counsel could not be held more than seven days).

By analogy, Appellant’s constitutional rights were violated when—over his objection—he was tried by a jury forced to work two weeks for legally inadequate pay. Even more so than the defense lawyer’s lack of adequate pay created ineffective assistance of counsel in *Martinez – Macias*, *Smith*, and *Peart*, Appellant’s jury’s lack of adequate pay violated his constitutional right to due process and a fair and impartial jury. See also, *State v. Citizen*, 898 So.2d 325, 339 (La. 2005) (trial judge may halt prosecution until adequate funds become available to ensure indigent defendants’ constitutionally protected right to counsel) and *State v. Wigley*, 624 So.2d 425 (La. 1993) (requiring

attorneys to defend without compensation violated *their* right to due process). See *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011) (discussing when a state law violation also violates due process). Retrial is required.

PENALTY PHASE ISSUES

9. Victim impact evidence from Keeling's widow violated Appellant's 14th Amendment due process right to fundamental fairness.

Preservation. This issue is preserved by Appellant's *pro se* motion to prohibit the prosecutors from informing the jury about the death of Tim Keeling.¹⁰³

Facts. Lisa Marie Hill married Timothy Keeling on September 30, 1989, just before she turned 20 years old and he turned 21.¹⁰⁴ They lived in Denver. He worked as a paramedic and volunteered as a youth pastor. She helped Tim with his ministry. They spent Friday and Saturday nights at the 16th Street Mall working with street kids and runaways. Because Denver can get cold at night, Tim would sometimes bring kids home with him. He would also bring kids to church.¹⁰⁵

Lisa testified that the last time she saw her husband was the end of September, 1991. The prosecutor asked her to describe her husband. Tim was very much a people person. He would not meet a person he did not know. He would walk up to someone and say "Hi. My name is Tim. What's your name?" He was immediately able to break down barriers with people by showing them that he cared. Being a paramedic and a youth pastor and in the ministry, he always cared about people. Not much of his time was not

¹⁰³TR3-IV, 541-542; CD3 Trial, 10/24/11, 11:37:00.

¹⁰⁴CD3 Trial, 10/24/11, 11:07:35; 11:15:00.

¹⁰⁵CD3 Trial, 10/24/11, 11:08:00-11:09:30.

spent with other people.¹⁰⁶

Then the prosecutor asked what Tim was doing the last night Lisa saw him. She said he had done some light housework, or was planning to, and then went to the grocery store to get stuff for when the inner-city kids came over to their house. Next, the prosecutor asked how she found out that she was never going to see him again. She said it took six days. The police came by her home and drove her to the station. The police told her that he had been killed. They showed her his class ring, which had his name, birthstone, a gold bar, and 1987 on it. It was from Cornerstone High School, which was a Christian school.¹⁰⁷

Cross-examination lasted only a couple of minutes. She testified about the size of their truck and the distance between Denver and the New Mexico-Texas state line. She also testified that while Tim worked with youth and not adults, he cared about people in general. He would take adults to the store and buy them food.¹⁰⁸

On redirect, Lisa explained that he was concerned about people being hungry. He was concerned about the person's need. The prosecutor followed up by asking if there was a larger purpose to providing food and shelter. Lisa explained, "Ultimately, yeah. That's the opportunity to share the faith that he had in Christ and the belief that there is more to life than just even that meal. That if you're not right in your relationship with Christ, then nothing else matters."¹⁰⁹

Argument. KRS 532.055(2) (a) (7) allows the prosecution to introduce evidence at the sentencing hearing of the "impact of the crime upon the victim or victims, as

¹⁰⁶CD3 Trial, 10/24/11, 11:12:00-11:13:25.

¹⁰⁷CD3 Trial, 10/24/11, 11:13:25-11:15:00.

¹⁰⁸CD3 Trial, 10/24/11, 11:16:00-11:18:40.

¹⁰⁹CD3 Trial, 10/24/11, 11:18:40-11:19:25.

defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims.” KRS 421.500(1) (b) includes, among other relationships, the spouse of the deceased. Reversible error occurred when the prosecution solicited victim impact evidence from Lisa Hill because she did not qualify as a victim under the statute since Appellant had not been convicted of murdering Tim Keeling.

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the United States Supreme Court held that no *per se* Eighth Amendment bar exists to the admission of victim impact evidence during the penalty phase of a capital trial. The testimony in *Payne* involved a relative informing the jury during the sentencing phase of Payne’s death penalty trial of the effects the victims’ deaths had on the family. The Court ultimately decided that the prosecution “may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.” *Id.* at 827.

However, the Court in *Payne* did not create a rule that allowed the automatic introduction of any and all victim impact evidence: “In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” *Id.* at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183 (1986)). Justice Stevens, who dissented in *Payne*, observed over two decades later that this “statement represents the beginning and end of the guidance we have given to lower courts considering the admissibility of victim impact evidence in the first instance.” *Kelly v. California*, 129 S.

Ct. 564, 566 (2008) (in dissent from denial of cert. petition).

This observation tests true. Little meaningful guidance exists regarding the scope of what victim impact evidence is constitutionally permissible. The Sixth Circuit, interpreting *Payne*, states the test this way: “The standard for such due process challenges is whether the evidence or argument ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Roe v. Baker*, 316 F.3d 557, 565 (6th Cir. 2002) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (concerning admission of evidence)); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (concerning prosecutorial misconduct). “The Fourteenth Amendment denies the States the power to ‘deprive any person of life, liberty, or property, without due process of law.’” *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968). “Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.” *California v. Trombetta*, 467 U.S. 479, 485 (1984).

Admission of Lisa Hill’s victim impact testimony about her deceased husband Tim Keeling deprived Appellant of a fundamentally fair capital sentencing trial for the murder of Frank Brady. Lisa’s testimony about Tim’s work as a paramedic, affinity for other people, service as a youth pastor, care for inner-city kids, and faith in Christ likely would be admissible under *Payne* in the sentencing phase of a trial for the murder of Tim Keeling. Indeed, this Court has stated that the “victim of a homicide ‘can be identified as more than a naked statistic’ and the defendant is not unduly prejudiced by the identification of the victim as a human being.” *Gray v. Commonwealth*, 203 S.W.3d 679, 689 (Ky. 2006).

However, reversible error occurred when this testimony about Tim was

introduced. No language in *Payne* --or in any other case-- authorizes, or even contemplates, the introduction of victim impact evidence of a person not the subject of the indictment being tried. Appellant was not being tried in Bullitt County for the murder of Tim Keeling. Tim Keeling was not the subject of the indictment and trial in this case. The jury did not return a verdict of guilty against Appellant for the murder of Tim Keeling as required by KRS 532.055(2), which operates as the prerequisite for the introduction of this type of testimony. The kidnapping of Tim Keeling in Denver and his murder in New Mexico were not the particular offenses of the indictment against Appellant for the murder of Frank Brady in Bullitt County, Kentucky. "States must ensure that 'capital sentencing decisions rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the *particular* offense' are considered." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987)) (emphasis added). Introduction of Lisa's testimony invited the risk that the jury decided to impose the death penalty on Appellant because Tim Keeling was a Christian who cared for under-privileged kids in Denver even though Appellant had not been indicted, tried, or convicted of murdering Tim Keeling—and could not be within the jurisdiction of Kentucky. Even if that was merely a portion of the jury's motivation, such a result violates fundamental fairness.

What happened to Keeling was a tragedy. No other word can describe the kidnapping and execution of a young man who practiced his faith by dedicating his life to working with inner-city young people. Given the emotional nature and rhetorical power of this evidence, the quality and character of Tim Keeling infected the entire sentencing proceeding below. *Roe*, 316 F.3d at 565. The jury could not have isolated and ignored

such emotional evidence because this victim impact evidence did not result from the particular offense for which Appellant faced the death penalty. KRS 532.055(2); *Romano*, 512 U.S. at 7. Admission of it unduly prejudiced Appellant's due process right to fundamental fairness in his capital sentencing trial. *Payne*, 501 U.S. at 825. Therefore, this Court should remand his case where this evidence is excluded if another capital penalty trial is held.

Introduction of this improper evidence was so fundamentally unfair that it violated 5th and 14th Amendment due process. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); see also, *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (unreliable prejudicial bite mark evidence violated due process, and should have been excluded). Allowing highly inflammatory victim impact evidence from the widow of a man that Appellant had not even been charged with killing to support this death sentence is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)).

10. Improper, excessively detailed evidence regarding prior convictions violated *Mullikan* and due process.

Preservation. This issue is unpreserved.

Facts. During Appellant's cross-examination, the Commonwealth elicited testimony concerning the details of four prior murders by Appellant, the shooting deaths of Ed Large, Mary Smith, Ronnie St. Clair, and William Kelsey, Jr. First, the Commonwealth

brought up the allegation that Ronnie St. Clair witnessed the shootings of Ed Large and Mary Smith, with Appellant shooting each of them in the head.¹¹⁰ Second, the Commonwealth prompted Appellant to say that he shot Mary Smith as she cowered in the back seat of Large's truck and pulled her coat over her head.¹¹¹ Third, the Commonwealth confirmed from Appellant that he had hired William Kelsey, Jr. to kill Ronnie St. Clair for \$500, after learning Ronnie tried to hire Kelsey to kill Appellant.¹¹² Kelsey killed Ronnie on May 12, 1990, and Appellant killed Kelsey the following night.¹¹³ The Commonwealth also elicited testimony that Kelsey was a contract killer who also worked for B. J. Moore, the sheriff. Finally, the Commonwealth forced Appellant to admit he and Ronnie were drug dealers.¹¹⁴ The drug charges against Appellant were eventually dismissed.¹¹⁵

In closing the Commonwealth heavily emphasized the improper details of Appellant's prior convictions that it had brought out during cross exam. In particular the Commonwealth made sure to **emphasize, twice**, Appellant's answer to the cross-examination question of whether it was hard to kill Mary Smith. Appellant's answer to the question was that it was "a little hard" because she pulled a jacket over her head, so Appellant was "not sure he had shot her."¹¹⁶ This response was one of the most chilling, prejudicial details in the case. In asking whether it had been "hard" to shoot Mary Smith, obviously, the questioner meant by this, was it emotionally hard. The complete lack of emotion in Appellant's response to this question could easily have been that little

¹¹⁰ CD3 Trial, 10/28/11, 11:33:29, 11:35:52, 11:36:58.

¹¹¹ CD3 Trial, 10/28/11, 11:34:27, 11:35:52.

¹¹² CD3 Trial, 10/28/11, 11:28:03.

¹¹³ CD3 Trial, 10/28/11, 11:31:23, 11:33:29.

¹¹⁴ CD3 Trial, 10/27/11, 11:28:09, 11:37:51, 11:38:39.

¹¹⁵ CD3 Trial, 10/28/11, 11:37:51, 11:38:13.

¹¹⁶ CD3 Trial, 10/28/11, 9:34:48, 9:53:30.

chilling, telling detail that pushed his jury to vote for death. Yet the question should never have been asked. The Commonwealth went on to argue other highly prejudicial details regarding Appellant's prior convictions, arguing that Ronnie St. Clair witnessed Appellant kill Ed Large and Mary Smith, and that was why he was subsequently killed – to get rid of an eyewitness.¹¹⁷ The Commonwealth argued this was the same reason that Appellant killed William Kelsey, Jr. – because Kelsey could testify to Appellant's involvement in Ronnie St. Clair's murder.¹¹⁸ None of this should ever have come in.

Further, the Commonwealth elicited extensive testimony regarding the death of Tim Keeling. Keeling was a young Christian man who left behind an even younger wife.¹¹⁹ While Keeling worked as a paramedic, he spent his free time volunteering as a youth pastor to inner-city youth.¹²⁰ The jury heard testimony of how Keeling was kidnapped and robbed of his truck outside a grocery store in Denver as he was picking up groceries, was shot in the head and back while travelling through New Mexico, and was yelling, "Oh, God!" as he was being shot.¹²¹ After the alleged shooting, Reese said Appellant allegedly told him that killing people was like killing dogs –that after you killed the first one, the next one was easy.¹²² And Reese claimed that Appellant had a trademark of shooting his victims once in the head behind the ear.¹²³ As Reese and Appellant drove away after the shooting, Reese testified that Appellant went through Keeling's wallet and ripped up a picture of a little girl, then tossed the picture out the

¹¹⁷ CD3 Trial, 10/28/11, 9:41:58.

¹¹⁸ CD3 Trial, 10/28/11, 9:42:04.

¹¹⁹ CD3 Trial, 10/24/11, 10:59:26; 11:07:35; 11:15:00.

¹²⁰ CD3 Trial, 10/24/11, 11:08:00-11:09:30.

¹²¹ CD3 Trial, 10/25/11, 9:56:27; 10/24/11, 9:49:42; 11:13:21.

¹²² CD3 Trial, 10/25/11, 9:56:45.

¹²³ CD3 Trial, 10/25/11, 9:56:58.

window.¹²⁴ Appellant had not at this time ever been charged –let alone convicted– regarding the events of Tim Keeling’s death.¹²⁵

Extraneous information about prior convictions is prohibited by KRS 532.025.

KRS 532.025, the statute that provides presentencing guidelines for death penalty cases, permits evidence of a defendant’s “record of any prior criminal convictions.” Similarly, KRS 532.055, presentencing guidelines for non-death penalty felony cases, permits evidence of “prior convictions of the defendant.” In addition, KRS 532.055 allows the Commonwealth to offer evidence of “[t]he nature of prior offenses for which he was convicted.” Tellingly, KRS 532.025 does not permit evidence of “the nature of the prior offenses” in death penalty cases.

As discussed below, it was improper for the trial court to permit the introduction of the facts and circumstances of Appellant’s prior offenses for which he was convicted, introduction of the circumstances Tim Keeling’s death, and introduction of uncharged and dismissed crimes. Reversal is required.

Extraneous information about prior convictions is prohibited by KRS 532.055.

Even if this Court views KRS 532.055 as being applicable in death cases to permit the introduction of “any other aggravating factors as otherwise authorized by law....,” the trial court still impermissibly allowed in evidence that exceed the “nature of prior offenses,” including the circumstances surrounding the deaths of Large, Smith, Ronnie St. Clair, Kelsey, and Keeling. Such an error resulted in manifest injustice.

In *St. Clair I*, this Court held the trial court did not err in permitting the

¹²⁴ CD3 Trial, 10/25/11, 9:57:05; 9:57:42.

¹²⁵ A New Mexico grand jury indicted Appellant in April 2012 for first-degree murder, kidnapping, and robbery, for the shooting death of Tim Keeling. See <http://ratonrange.com/charges-pursued-in-killing-escaped-inmates-allegedly-kidnapped-colora-p4030-1.htm>, last visited 11/27/2012.

Commonwealth to introduce “the entirety of the Oklahoma prosecutors’ informations that led to Appellant’s four (4) First-Degree Murder convictions and his Solicitation of Murder conviction.” 140 S.W.3d at 561. The informations included: (1) the name of the defendant (and any co-defendant), (2) the date the offense was committed, (3) the offense charged, (4) the name of the victim, (5) the weapon used in each offense (a firearm), and, in the Murder informations, (6) the fact that the victim died. *Id.* at 561. This Court reasoned in 2004 that, “[b]ecause the language of the informations contained no more than a ‘general description’ of Appellant’s prior convictions, the trial court overruled Appellant’s objection” raised at the 1998 trial. *Id.* at 562.

But this Court has since established a bright line rule regarding what is permissible for the Commonwealth in showing the “nature of [the defendant’s] prior offenses” under KRS 532.055(2) (a). *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). In *Mullikan*, this Court reversed for a new sentencing hearing because a police officer gave information he learned from police reports and other witnesses about the defendant’s prior convictions, including information about the defendant having a disagreement with an employee at a Family Dollar Store and the defendant putting his hands around a woman’s neck. *Id.* at 108. Besides the hearsay problem, this Court expressed concern that the information exceeded the scope of the “nature of prior offenses.” *Id.* at 108-09.

“[E]vidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed,” through a form book or from the Kentucky Revised Statute itself. *Id.* at 109. By following this bright line rule, a jury is prevented from impermissibly retrying prior crimes through the admission of extensive prior-crime

evidence at sentencing. *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky. 1996).

Accordingly, letting a jury hear this highly prejudicial evidence is “so egregious as to [result] in manifest injustice...,” e.g., a palpable error. *Webb v. Commonwealth*, --- S.W.3d ----, 2012 WL 5877963, p. 7 (Ky. 2012).

In this case, the Commonwealth presented highly detailed and prejudicial evidence of Appellant’s prior convictions. First, the Bullitt Circuit Clerk testified the maximum penalty for the prior murders was death.¹²⁶ Second, the Commonwealth asserted, without any foundation, that Ronnie witnessed Appellant shoot Large and Smith and that was why Appellant eventually shot Ronnie, to get rid of a witness. The Commonwealth asserted further that Kelsey was shot because he witnessed the Ronnie shooting. The implication was that Appellant was a serial killer who killed witnesses.

Third, the Commonwealth forced Appellant to discuss the details of Mary Smith’s murder, that she was either passed out or hiding as Appellant shot her while she tried to hide in the back of Ed Large’s truck. These facts were used to devastating effect during closing when the Commonwealth speculated that Appellant was not sure he had actually shot Smith due to her covering herself with a jacket.

Finally, and perhaps the most damning, the Commonwealth elicited testimony of how selfless Tim Keeling was, how he was kidnapped, how he was shot twice, how he cried, “Oh, God!,” as he was being shot, and how Appellant nonchalantly compared shooting Keeling to shooting a dog.

That and the admission of unduly prejudicial evidence of the circumstances of the Large, Smith, Ronnie St. Clair, and Kelsey murders rendered the resentencing

¹²⁶ CD3 Trial, 10/26/11, 9:10:14, 9:13:50, 9:14:04, 9:18:30.

fundamentally unfair. Such "loaded" evidence needlessly inflamed the jury's passion and prejudice against Appellant and denied him a fair trial. A new resentencing is required where evidence of prior convictions is limited to the elements of the crimes previously committed. *Webb*, 2012 WL 5877963 at *7.

Evidence of uncharged crimes and dismissed charges is prohibited by *Blane v. Commonwealth*.

Even if KRS 532.025 permits a general description of Appellant's convictions, the Commonwealth far exceeded the scope of Appellant's "record of any prior criminal convictions" that was condoned by this Court in *St. Clair I*. Far more prior conviction details were introduced here than in 1998. This evidence is also not "otherwise authorized by law...." Specifically, *Mullikan* prohibits telling a jury the name of a victim and the details of his or her death, details like Mary Louise Smith cowering in the back of a truck while Appellant shot her in the head, and details about Tim Keeling's kidnapping, being forced to ride in his own truck with Appellant and Dennis Reese, details of his Christian faith and ministry, and his death by shooting.

The Commonwealth should not have been permitted to introduce evidence related to Keeling's shooting or of Appellant's dismissed drug trafficking charges as these were not admissible as prior convictions under KRS 532.055. Appellant was never convicted of any of these crimes. *Blane v. Commonwealth*, 364 S.W.3d 140, 152-53 (Ky. 2012) (palpable error to admit dismissed charges and original charges later amended). In *Blane*, the defendant received the maximum penalty, the Commonwealth elicited testimony of the original charges, and the Commonwealth emphasized the original charges in its closing. *Blane*, 364 S.W.3d at 152. The *Blane* Court held it was palpable error when a defendant receives a maximum sentence after a jury is told of the defendant's amended

charges.

In reversing *Blane* for a new sentencing hearing, this Court cited with approval the proposition “that the maximum sentence has been imposed by the verdict, and it would be pure speculation for us to ponder what, if any, portion of the punishment stemmed from the improper argument of counsel.” *Blane*, 364 S.W.3d at 153 (quoting *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969) (reversing and granting defendant a new trial after the prosecutor made improper comments during closing arguments)).

Similar to what occurred in *Blane*, Appellant was sentenced to the maximum sentence of death and it would be impossible to speculate whether testimony related to the uncharged or dismissed crimes contributed to his death sentence.

In light of *Mullikan*, *Webb*, and *Blane*, the wholesale admission of evidence concerning the deaths of Large, Smith, Ronnie St. Clair, Kelsey, and Keeling, along with evidence of uncharged and dismissed crimes are palpable errors contrary to current Kentucky statutes and case law. Thus, Appellant’s rights under the 5th and 14th Amendments of the U.S. Constitution and Sections Two and Eleven of the Ky. Constitution were violated. Appellant respectfully requests this Court to reverse and remand his case to the Bullitt Circuit Court for a new sentencing hearing.

Introduction of this improper evidence was so fundamentally unfair that it violated 5th and 14th Amendment due process. “Where constitutional rights directly affecting the ascertainment of guilt are implicated,” evidence rules “may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); cf., *Ege v. Yukins*, 485

F.3d 364 (6th Cir. 2007) (unreliable prejudicial bite mark evidence violated due process, and should have been excluded). Allowing the *Moss* evidence to support this death sentence is “so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)).

11. The Commonwealth improperly asked witnesses to call other witnesses liars in violation of *Moss* and due process.

Preservation. This issue is unpreserved. Appellant requests review under RCr 10.26.

Facts. The Commonwealth asked Appellant to characterize numerous witnesses as liars. First, St. Clair was forced to characterize Oklahoma State Bureau of Investigation (OSBI) Agent Perry Unruh as lying about Appellant gaining weight during his escape.¹²⁷ Appellant also had to characterize Trooper Bennett’s and Martin Comely’s testimony identifying him in Kentucky as being wrong.¹²⁸ Finally, Appellant was forced to characterize Bylynn as lying about bringing handcuffs, clothing, etc., to Appellant after his jail escape.¹²⁹

Argument. This Court has strongly cautioned against asking a witness to comment on the truth of another witness. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997); see also *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928) (the Court reversed the appellant’s conviction due to improper cross-examination of the appellant).

In *Moss*, the prosecutor badgered the defendant into stating a testifying police

¹²⁷ CD3 Trial, 11/26/11, 13:31:34, 13:18:38.

¹²⁸ CD3 Trial, 11/26/11, 13:32:11.

¹²⁹ CD3 Trial, 11/26/13:04:10; 13:13:22, 13:18:38; 11/27/11, 11:17:14.

officer was lying during cross-examination. *Id.* at 583. This claim of error was unpreserved and the *Moss* court declined to find palpable error. However, *Moss* was not a death penalty case, and nonetheless this Court stated that “a witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying.” *Id.* at 583. The Court warned that this type of question “places the witness in such an unflattering light as to potentially undermine his entire testimony.” *Id.* Further, a prosecutor should not resort to blunt force to show the jury where the testimonies of the witnesses differ. *Id.* Whether a witness is lying or not is a decision “within the exclusive province of the jury.” *Id.* (quoting *State v. James*, 557 A.2d 471, 472 (R.I. 1989)).

Even when a *Moss* violation is properly preserved, appellate courts still review for harmless error. RCr 9.24. The test for harmless error is “whether on the whole case there is a substantial possibility that the result would have been any different.” *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). An error is also harmless if the “judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

In this case, there is a substantial possibility that the result would have been different because Appellant could have been given a sentence less than death but for the Commonwealth’s misconduct.

First, this Court held in *St. Clair I* that the Commonwealth’s *Moss*-type questions in 1998 were impermissible, but did not constitute reversible error because the excluding the *Moss*-type questions would not have resulted in a different verdict. *St. Clair I*, at 554. Even if there is no possibility that a jury would fail to return with a guilty verdict, there is

still a possibility that the jury could return with a sentence less than death.

The Commonwealth's *Moss*-type questions to Appellant constituted prosecutorial misconduct that possibly affected the sentence. Appellant received the maximum sentence of death. Further, the *Moss*-violations that occurred here were more egregious than in the prior trial and resentencing as this Court had already warned the Commonwealth that these types of questions should be avoided. As discussed *supra* in Argument 10, this Court has held that introducing uncharged and dismissed charges was reversible error because "the maximum sentence has been imposed by the verdict, and it would be pure speculation for us to ponder what, if any, portion of the punishment stemmed from the improper argument of counsel." *Blane*, 364 S.W.3d at 153 (quoting *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969) (reversing and granting defendant new trial after the prosecutor made improper comments during closing arguments)). This Court presumed prejudicial palpable error when the jury recommended the maximum sentence. *Id.* at 152. Similarly, the Commonwealth, in asking Appellant numerous impermissible *Moss*-type questions, ignored and flouted this Court's holding in *St. Clair I* that this type of questioning is error. *St. Clair I*, 140 S.W.3d at 554. The Commonwealth's actions resulted in a maximum sentence of death. Accordingly, prejudice should be presumed. A new sentencing is required.

The trial court erred to Appellant's substantial prejudice and denied him due process of law by encouraging the blatant *Moss* violations. §§ 2, 7, & 11, Ky. Const.; 5th, 6th & 14th Amends., U.S. Const. The introduction of this improper evidence was so fundamentally unfair that it violated 5th and 14th Amendment due process. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence

rules “may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); *cf.*, *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (unreliable prejudicial bite mark evidence violated due process, and should have been excluded). Allowing the *Moss* evidence to support this death sentence is “so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)).

12. Appellant’s marital privilege rights were violated.

Preservation. This issue is preserved. In Appellant’s *pro se* motion to set aside his conviction and for a new sentencing, he argued his marital privilege was violated when the Commonwealth used testimony from a phone call between Appellant and his then wife, Bylynn.¹³⁰ The trial court overruled the motion based on the law of the case.¹³¹

Facts. Bylynn’s testimony regarding the phone conversation between her and Appellant¹³²:

Commonwealth: Did Michael ever say anything to you about whether he was or wasn’t planning to escape while other people were around?

Bylynn: No.

Commonwealth: Now, before the escape, did you personally know the man you referred to earlier as Dennis Reese?

Bylynn: No.

Commonwealth: Had you ever seen him?

¹³⁰ Final Sentencing, CD3 Hearings, 11/16/11, 9:30:39 – 9:32:00.

¹³¹ Final Sentencing, CD3 Hearings, 11/16/11, 9:30:58.

¹³² CD3 Trial, 10/25/11, 15:25:06.

Bylynn: Just at the jail.

Commonwealth: Shortly after the escape, did there come a time where you had an opportunity to see Michael?

Bylynn: Yes.

Commonwealth: And would you tell us how that came about please?

Bylynn: Um, I went to see him in a little town near Dallas, Texas.

Commonwealth: And that's where you saw him?

Bylynn: Yes.

Commonwealth: Now I want to back up a little if I could. How did it come to be that you knew to meet him at a little town by Dallas?

Bylynn: I talked to him on the phone and I talked to his mother.

Commonwealth: Now, as a result of that conversation with Michael and his mother, by the way, what is her name?

Bylynn: Roxy St. Clair.

Commonwealth: As a result of that conversation, did you gather any items?

Bylynn: Yes.

Commonwealth: Did you write a list up?

Bylynn: I had a list made up.

Commonwealth: Do you remember exactly every item that you brought?

Bylynn: Not every item.

Commonwealth: That you compiled?

Bylynn: I remember some of them.

Commonwealth: Would you tell us about some of those items?

Bylynn: I brought some money to Michael, some clothes, and some socks, his black comb, and some binoculars, and a radio, a small radio that sits on, two pairs of handcuffs, and some tape.

Commonwealth: Do you remember whether you did or did not bring him a flashlight?

Bylynn: Oh, yes, I brought his flashlight from home.

Argument. KRE 504 contains a spousal testimonial privilege in KRE 504(a), a confidential marital communications privilege in KRE 504(b), and exceptions to those privileges in KRE 504(c). *St. Clair v. Commonwealth*, 174 S.W.2d 474, 479 (Ky. 2005) (*St. Clair - Hardin*). The two privileges protect and enhance the marital relationship at the expense of otherwise useful evidence. *Id.*, citing *Gill v. Commonwealth*, 374 S.W.2d 848 (Ky. 1964).

In *St. Clair - Hardin*, this Court held that the trial court committed reversible error in admitting privileged statements between Appellant and Bylynn. *Id.* at 481. The first privileged statement included Bylynn's testimony that when she met Appellant in Oklahoma the night before he was arrested, he told her that he and Reese had to leave their belongings and that they burned a truck. *Id.* at 478. The second privileged statement was a telephone conversation between her and Appellant that Appellant was in Louisiana with Reese and that he had to leave something in the truck. *Id.*

First, there was no exception to the privilege because while Bylynn facilitated Appellant's flight after his escape from jail, "there was no evidence Bylynn conspired or acted jointly in the commission of the crimes with which Appellant was charged (two counts of receiving stolen property over \$100, criminal attempt to commit murder, second-degree arson, or capital kidnapping)." *Id.* at 480.

Second, the above two statements to which Bylynn testified were parts of a confidential communication and should have been excluded based on the marital

privilege. *Id.* Further, “[t]he admission of the privileged statements was prejudicial because the Commonwealth [in the Hardin County case] used this testimony to corroborate Reese's testimony that [Appellant] was the ringleader and the shooter.” *Id.* at 481. Accordingly, this Court held in the Hardin County case that “the admission of Bylynn's testimony was prejudicial error and retrial [was] required.” *Id.* Regarding two other statements that Bylynn testified to that were possibly privileged, this Court required the trial court to hold a hearing at retrial to determine whether the statements were confidential. *Id.*

In this case, just as in *St. Clair – Hardin*, reversal is required because while the admitted testimony did not consist of the same comments that caused the reversal in Hardin, the trial court still admitted Bylynn's testimony in violation of Appellant's marital privilege. First, the trial court did not conduct an analysis under KRE 504. Instead, the trial court relied on the law of the case – that this Court had already permitted Bylynn to testify. However, this Court in *St. Clair I* clearly held **only** that Bylynn's deposition testimony was admissible under RCr 7.20(1), which permits deposition testimony “so far as otherwise admissible under the rules of evidence....” 140 S.W.3d at 539. The trial court's failure to even address the question of whether Bylynn's deposition testimony violated Appellant's marital privilege issue was an abuse of discretion.¹³³ *Meyers v. Commonwealth*, --- S.W.3d ---, 2012 WL 5274650, **4-5 (Ky. 2012) (trial court abused its discretion in permitting a witness to testify in violation of the spousal testimonial privilege, but error deemed harmless).

Further, Bylynn's testimony was critical., Her testimony about feeling a gun on

¹³³ CD3 Trial, 10/25/11, 13:00:14. (the trial court indicated that it was allowing everything that came in from the prior trials).

Appellant¹³⁴ and about bringing handcuffs and other items to Appellant that were ultimately recovered in Kentucky (e.g., jeans, small radio, etc.) linked Appellant to being in Kentucky and to Brady's death.¹³⁵ The Commonwealth used her testimony to corroborate and bolster Reese's testimony – telling the jury that her testimony matched his.¹³⁶

Introduction of improper, prejudicial evidence can be so fundamentally unfair that it violates 5th and 14th Amendment due process. “Where constitutional rights directly affecting the ascertainment of guilt are implicated,” evidence rules cannot be allowed to defeat the ends of justice. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also, *Green v. Georgia*, 442 U.S. 95, 97 (1979); cf., *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (unreliable prejudicial bite mark evidence violated due process, and should have been excluded). Introducing improper to support this death sentence is “so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing, *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). This error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). See also *Trammel v. United States*, 445 U.S. 40, 51, (citing *Blau v. United States*, 340 U.S. 332 (1951) (no other privilege sweeps so broadly as the marital privilege). Resentencing is required.

13. The Commonwealth engaged in repeated prosecutorial misconduct, violating Appellant's rights under the 6th, 8th and 14th Amendments.

Preservation. The issue is unpreserved. Appellant requests review under RCr

¹³⁴ CD3 Trial, 10/25/11, 15:34:10.

¹³⁵ CD3 Trial, 10/25/11, 15:25:06.

¹³⁶ CD3 Trial, 10/28/11, 9:29:33.

10.26.

Facts. The Commonwealth rendered this second resentencing fundamentally unfair in at least five distinct and concrete ways. First, the Commonwealth introduced victim impact evidence of Tim Keeling, who was not the victim of the underlying charge. *See* Victim Impact Argument 9, *supra*. Second, the Commonwealth introduced evidence of uncharged and dismissed crimes, along with prejudicial details beyond the “nature of the offenses” in violation of statutory and case law. *See* *Mullikan* Argument 10, *supra*. Third, the Commonwealth asked impermissible *Moss*-type questions, flouting this Court’s warnings. *See* *Moss* Argument 11, *supra*. Fourth, the Commonwealth introduced testimony not presented at the 1998 trial and repeatedly bolstered a key witness, rendering this resentencing fundamentally unfair. Specifically, Dennis Reese testified that Appellant made Vernon Stephens kneel down in the backyard and then pointed a gun at Stephens’s forehead, threatening to shoot him.¹³⁷ And fifth, in closing argument, the prosecutor expressly told the jury to disregard their obligation to consider the entire range of penalties, and instead to consider just one penalty, death.

New evidence was improperly elicited from Dennis Reese.

The Commonwealth used blatantly leading questions to bring out new evidence from Reese related to the theft of Mr. Stephens’ truck: “So you get this truck, how long from, when this man is knelt down in the yard, with the defendant here, holding a muzzle of a hand gun to his head, to when you get the keys from her and getting the truck?”¹³⁸ This bolstered Reese’s later testimony that Appellant made Brady kneel down when he

¹³⁷ CD3 Trial, 10/25/11, 9:22:25.

¹³⁸ CD3 Trial, 10/25/11, 9:24:15.

shot him.¹³⁹ Next, the Commonwealth asked Reese, "So he jumps back in the truck, telling you where he made the guy kneel down and shot him?"¹⁴⁰ Reese nodded yes.

During Reese's cross-examination, Reese reviewed the transcript of his testimony from the 1998 and 2005 trials and admitted there was no prior testimony about Appellant making Stephens kneel while pointing a gun at his head.¹⁴¹ Reese claimed that he did not testify to it because he was not directly asked about it.¹⁴² The Commonwealth asked the following questions of Reese:

Commonwealth: Did you make her (Reese's murder victim) kneel down?

Reese: No.

Commonwealth: Did you fire into her face?

Reese: No.

Commonwealth: Did you do a trademark shooting behind the ear or anything like that?

Reese: No.¹⁴³

Commonwealth: Did you ever have anybody kneel down and put the barrel of a handgun to their head?

Reese: No.

Commonwealth: Did you ever put handcuffs on them and do that?

Reese: No.

Commonwealth: Ever fire into their head, this is all before you're at the Bryan County Jail, you ever murder anyone like that?

¹³⁹ CD3 Trial, 10/25/11, 10:41:12.

¹⁴⁰ CD3 Trial, 10/25/11, 10:42:21.

¹⁴¹ CD3 Trial, 10/25/11, 11:51:10, 11:53:28.

¹⁴² CD3 Trial, 10/25/11, 11:47:40.

¹⁴³ CD3 Trial, 10/25/11, 13:33:31.

Reese: No.¹⁴⁴

To constitute reversible error, a prosecutor's comments must be serious enough to render the whole trial fundamentally unfair. *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996); *Smith v. Phillips*, 455 U.S. 209 (1982). The Commonwealth's repeated misconduct in this third sentencing trial rendered Appellant's trial fundamentally unfair, manifestly unjust, and denied him due process of law. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); 6th, 8th, 14th Amends., US Const.; § 1, 2, 7, 11, 17, 26 Ky. Const. In reviewing claims of prosecutorial misconduct, this Court "must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Prosecutorial misconduct becomes reversible error when the misconduct is flagrant. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002).

The prosecutor's conduct was flagrant. The prosecutors were on notice from the prior cases that *Moss*-type questions --asking one witness to say another witness was lying--were inappropriate. Yet those questions were asked anyway. The prosecutors violated the holdings of *Mullikan* and *Moss* even though these cases were rendered over four months and fourteen years, respectively, before this resentencing. On top of that, the prosecutors introduced lead bullet evidence despite knowing the FBI had determined CBLA is junk science. See Argument 1, *supra*. The prosecution induced Tim Keeling's widow to present victim impact evidence knowing full well **she was not a victim** of the crime charged against Appellant, and knowing that her testimony could not possibly be

¹⁴⁴ CD3 Trial, 10/25/11, 13:34:14.

considered part of the 1998 evidence. In their single-minded pursuit of securing a death sentence, the prosecutors improperly bolstered Reese's testimony, and introduced guilt-phase evidence they knew had not been admitted in 1998, just to bolster their image of Appellant forcing Frank Brady to kneel before he was executed.

The prosecutors also violated *Blane*. While *Blane* was rendered after this resentencing, the *Blane* decision relied, in part, on a 1969 case, *Taulbee v. Commonwealth*, 438 S.W.2d 777 (Ky. 1969).

This was not a case of prosecutors not knowing newly decided laws or procedures. This was a case of prosecutors ignoring this Court's holdings and ignoring the invalidation of so-called scientific evidence for the sole aim of securing a death sentence.

The Commonwealth told the jury NOT to consider the entire range of penalties, both in voir dire and closing argument.

During voir dire, the prosecution explained to the jury that it was asking for the death penalty for Appellant and argued that death was the only sentence that would make a difference.¹⁴⁵ Worse, in closing, in repeating the argument that anything but the death penalty would be "nothing," the Commonwealth went completely overboard by expressly telling the jury "**not to consider anything but death.**"¹⁴⁶ The prosecutor told the jury that "the rest [of the possible penalties] are meaningless." Critically, by telling the jury not to consider anything but death, the prosecutor was telling the jury to **disregard their duty to consider the entire range of penalties**. He told them repeatedly, "Only one

¹⁴⁵ CD3 Hearings, 10/3/11, 11:06:49; CD3 Supp., 10/18/11, 13:33:27, 13:49:05; CD3 Trial, 10/27/11, 11:40:10, 11:41:08.

¹⁴⁶ CD3 Trial, 10/28/11, 9:07:12 – 9:10:14.

punishment will do.”¹⁴⁷ This was a flagrant violation of *Lockett v. Ohio*, 438 U.S.586 (1978) and its progeny, because it was an order **not to consider mitigation**. See also *Gall v. Parker*, 231 F3d 265 (6th Cir. 2000); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110-11 (6th Cir. 1990) (en banc).

In any consideration of prosecutorial misconduct, the appellate court must focus on the overall fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209 (1982). The reviewing court must determine whether the conduct was of such an "egregious" nature as to deny the accused his 14th Amendment constitutional right to due process of law. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Here the prosecutor's misconduct took many forms and continued from voir dire through presentation of evidence and closing argument. The prosecutors' flagrant misconduct undermined the overall fairness of the proceedings and trampled on Appellant's 6th, 8th, and 14th Amendment rights to a fair resentencing. A new sentencing is required.

14. Failure to instruct on “innocence of the death penalty” violated the 8th and 14th Amendments.

Preservation. This issue is partially preserved by the defense tender of Instruction No. 1, that “[i]n considering such evidence as may be unfavorable to the defendant, you will bear in mind the same Instruction that was given to [sic] in the first stage of the trial proceeding, to the effect that the law presumes a defendant to be innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty. You shall apply the same presumption in determining whether there exist aggravating circumstances bearing on the question of what punishment should be

¹⁴⁷ CD3 Trial, 10/28/11, 10:00:16.

fixed for the defendant in this case.”¹⁴⁸

Facts and Argument. Instruction No. 5 told the jury, “If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.” This instruction failed to inform the jury that it retained the option not to sentence Appellant to death no matter what. Instruction No. 5 failed to explain any difference between reasonable doubt about the aggravator and reasonable doubt upon the whole case. The jury could have concluded that believing the aggravator equated to removing all reasonable doubt from the whole case. In *Gall v. Commonwealth*, 607 S.W.2d 97, 112 (Ky. 1980), this Court approved instructions that made it clear that even though the jury believed the aggravating circumstance was true and that it outweighed mitigation, it still did not have to recommend the death penalty. Here there was no such instruction and the jury was not informed that even if it concluded the aggravating circumstance existed, it could still have a reasonable doubt about “the whole case.”

More importantly, the law presumes a defendant innocent of aggravating circumstances and unless these are proved beyond a reasonable doubt, the appropriate sentence for murder is a punishment other than death. Failure to instruct the jury accordingly violated due process under the 14th Amendment. *Taylor v. Kentucky*, 436 U.S. 478 (1978). Contrary dicta in *Smith v. Commonwealth*, 599 S.W.2d 900, 909 (Ky. 1980) stating that such an instruction would, “of necessity” prohibit the jury from recommending death should be absolutely rejected. Because this was a failure to channel the jury’s decision to impose death, it also violated the 8th and 14th Amendments. *Proffitt*

¹⁴⁸Defendant’s Requested Instructions, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

v. Florida, 428 U.S. 242, 258 (1976); *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

15. **The instructions allowed the jury to presume the aggravator true, shifting the burden of proof in violation of due process and the 8th and 14th Amendments.**

Preservation. This issue is partially preserved, as stated in Argument 14, above, by the defense tender of Instruction No. 1. It is also preserved by defense-tendered Instruction No. 5, which states: “The burden of proof in this case rests upon the Government from the beginning to the end of the trial to establish beyond a reasonable doubt every fact essential to the of [sic] Michael St. Clair for this offense....” The error is also manifest from the instructions given and palpable under RCr 10.26.

“Instruction No. 2 –Aggravating Circumstance” directs that in fixing Appellant’s sentence, the jury shall consider **“the following aggravating circumstance which you may believe from the evidence beyond a reasonable doubt to be true”**:

INSTRUCTION NO. 2 –AGGRAVATING CIRCUMSTANCE

In fixing a sentence for the Defendant for the offense of MURDER, you shall consider **the following aggravating circumstance which you may believe from the evidence beyond a reasonable doubt to be true:**

1. The offense of Murder of Frances C. Brady was committed by a person with, at the time of the murder, a prior record of conviction for a capital offense, to wit: the September, 1991 Oklahoma jury verdict for the first degree murder of William Henry Kelsey, Jr., and or the September, jury verdict 1991 Oklahoma for the first degree murder of Ronnie St. Clair, each capital offenses.¹⁴⁹

Argument. According to the Merriam–Webster Dictionary Online, the “first” modern-day meaning of “may” is to “have permission to” as in “you may go now”.¹⁵⁰ According to Webster, “have the ability to” is only the *archaic* meaning of “may.” Thus,

¹⁴⁹ Penalty Phase Jury Instructions, Instruction No. 2, TR3-IV, 553, at Tab 7. (emphasis added)

¹⁵⁰ <http://www.merriam-webster.com/>

a modern-day jury looking at Instruction No. 2 would probably believe the court was giving them *permission to* go ahead and believe from the evidence the aggravator was true.

By contrast, “Instruction No. 3 –Mitigating Circumstances” contains no permissive “may” language and correctly tells the jury to consider the single statutory mitigator only “[i]f you believe it to be true....”¹⁵¹ The fact the two instructions are worded differently reinforces the idea that while the jury was told to determine mitigation, it was told it had *permission* to presume aggravation.

The punctuation of Instruction No. 2 adds to the problem. An “aggravating circumstance which you may believe is true” is different from an “aggravating circumstance, which you may believe is true.” Instruction No. 2 has no comma setting off the subject “aggravating circumstance” from its restrictive clause: “which you may believe from the evidence beyond a reasonable doubt to be true.” The lack of a comma in No. 2 after “aggravating circumstance” renders the clause that follows it a “restrictive clause” that restricts and limits the meaning of its subject: “aggravating circumstances.”¹⁵² The jury was not told Appellant had a possible prior conviction that they must determine; they were told he had a *believable* prior conviction.

Even **with** a comma, the word “may” would still have meant “have permission to” believe the aggravator. A comma would have provided a little pause, at least, between the aggravating circumstance and the court’s permission to believe it. The lack of a comma makes it even more likely the jury assumed Appellant’s prior capital offense true. On top

¹⁵¹ *Id.*

¹⁵² See any reputable online resource for English grammar, e.g., <http://www2.ivcc.edu/rambo/eng1001/commas.htm>

of that, what the court was saying they could presume true was a *prior out-of-state conviction*, a bunch of foreign legal paperwork, *exactly the sort of thing a reasonable juror would think a court could better evaluate*. Permission to presume the prior conviction true would have made perfect sense to the jury.

After the court tells the jury to presume the aggravator and determine the mitigator, Instruction No. 4 tells the jury it cannot fix Appellant's sentence at death "unless you are satisfied from the evidence beyond a reasonable doubt that the statement listed in No. 2 (aggravating circumstance) is true in its entirety...."¹⁵³ But since the court at this point has already given permission to presume the aggravator, the jury could have interpreted No. 4 as the court's explanation **why** it gave permission, i.e., because otherwise no death penalty could be imposed. Instruction No. 5 states that "[i]f you have a reasonable doubt as to the truth or existence of the aggravating circumstance listed in Instruction No. 2 (Aggravating Circumstance), you shall not make any finding with respect to it."¹⁵⁴ But a jury holding a grant of permission to *presume* the aggravator could interpret No. 5 as superfluous legalese. A jury with permission to presume Appellant's prior conviction true could decide *on that basis* that they had no reasonable doubt about it. The jury could have inferred that the judge looked at the foreign prior conviction paperwork and believed it. This could easily remove all reasonable doubt for the jury.

The only prior case with an instruction equal in opacity is unpublished. In that case, the Court of Appeals found an improper burden shift when a jury was told to find the defendant guilty of a lesser offense if it believed **both** that certain circumstances existed **and** that such circumstances privileged the defendant to act in self-defense:

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Appellant objects to the above instruction because it required the jury to “believe from the evidence and beyond a reasonable doubt” that Curran was about to use physical force and that appellant was privileged to use physical force as necessary to protect himself. Appellant alleges that this instruction improperly shifted the burden of proof from the Commonwealth to him....

Halvorson v. Commonwealth, 2005 WL 3488266 (Ky. App. 2005) (reversing) (unpublished, attached at Tab 8).

Instructions 2 and 3 misled the jurors in a way that eased the Commonwealth’s burden of proof and constitute prejudicial, reversible error. *Estep v. Commonwealth*, 64 S.W.3d 805, 811 (Ky. 2002) (instruction failed to inform the jurors that the burden of proof was on the Commonwealth); *see also, Jackson v. Virginia*, 443 U.S. 307 (1979) and *In re Winship*, 397 U.S. 358 (1970) (burden is on the Commonwealth to prove each element beyond a reasonable doubt). These instructions are not “sufficiently clear and precise” to enable the aggravating and mitigating circumstances to be properly considered. The jury’s sentencing discretion was not properly “guided and channeled.” *Proffitt v. Florida*, 428 U.S. 242, 258 (1976); *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (mandating “careful instructions on the law and how to apply it”).

16. Failure to define reasonable doubt violated due process.

Preservation. This issue is partially preserved by the tender of a proposed reasonable doubt instruction stating that:

...[t]he jury is instructed that reasonable doubt may arise only from the evidence presented and the burden is solely upon the Government to prove each and every essential element as to the aggravating circumstances listed in Jury Instruction No. 2. If the jury has reasonable doubt as to the truth of the existence of any element of the aggravating circumstances, you shall not make any finding with respect to it. If the jury has a reasonable doubt whether Michael St. Clair should be sentenced to death, his punishment shall be fixed at a sentence of imprisonment.”¹⁵⁵

¹⁵⁵ Defendant’s Requested Instructions, Instruction No. 6, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

Argument. Reasonable doubt was not defined for Appellant's jury. RCr 9.56 states that the instructions should not attempt to define the term "reasonable doubt." As explained in *Pevlor v. Commonwealth*, 638 S.W.2d 272, 276-277 (Ky. 1982), this rule was a response to *Taylor v. Kentucky*, 436 U.S. 478 (1978), which criticized Kentucky's instructions regarding reasonable doubt. *Taylor*, 436 U.S. at 486-490. RCr 9.56 was adopted to ensure this would never happen again. But a solution that refuses all definition of reasonable doubt violates due process. This Court should overrule *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980), and *Smith v. Commonwealth*, 599 S.W.2d 900, 911 (Ky. 1980).

Under the due process clause of the 5th and 14th Amendments, to convict the accused, the prosecution must prove every element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978), lists reasonable doubt as a concept "that must not be misunderstood" if a defendant is to receive due process.

Key elements of valid reasonable doubt instruction have been approved, including the concept that a reasonable doubt is a doubt "based on reason," *Jackson v. Virginia*, 443 U.S. at 317, that a reasonable doubt is a doubt "based on reason which arises from the evidence or lack of evidence," *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), and that reasonable doubt is a doubt that would cause a reasonable person to "hesitate to act" in matters of importance. *Holland v. United States*, 348 U.S. 121, 140 (1954).

Every federal circuit except the 7th allows for instruction on the meaning of

reasonable doubt.¹⁵⁶ This Court should exercise its power under the Kentucky Constitution to prescribe rules of practice and procedure and rule that jury instructions defining reasonable doubt are not prohibited. Ky. Const. § 116. Under *Whiteside v. Parke*, 705 F.2d 869 (6th Cir. 1983), the failure to define reasonable doubt violates the constitution when it deprives a defendant of due process in light of the totality of the circumstances. *Id.* at 871-872.

In a capital sentencing trial, the concept of “innocence of the death penalty” and the need for proof beyond a reasonable doubt that a death sentence is called for are foreign ideas to most jurors. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 347, (1992) (“actual innocence of the death penalty” may be shown by clear and convincing evidence). But with the stakes so high, reasonable doubt should be defined in every capital sentencing trial. A death verdict from a jury that has not been instructed on reasonable doubt violates due process and requires reversal under the 5th, 6th, and 14th Amendments. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Failure to instruct on reasonable doubt was structural error under *Sullivan* regardless of prejudice. It was at least palpable error warranting reversal under RCr 10.26 because it threatened Appellant’s entitlement to due process.¹⁵⁷

¹⁵⁶ *U.S. v. Wallace*, 461 F.3d 15, 28 (1st Cir. 2006); *U.S. v. Shamsideen*, 511 F.3d 340, 343–344 (2d Cir. 2008); *Blatt v. U. S.*, 60 F.2d 481 (3d Cir. 1932); see also *U. S. v. Polan*, 970 F.2d 1280, 1286 n.4 (3d Cir. 1992); *U. S. v. Walton*, 207 F.3d 694, 695 (4th Cir. 2000) (“The rule regarding reasonable doubt for the jury is well settled in this Circuit—a trial judge may define reasonable doubt only if the jury requests a definition; however, the trial judge is not required to provide a definition, even if the jury requests it.”); *U. S. v. Williams*, 20 F.3d 125 (5th Cir. 1994) (While not requiring trial courts to define reasonable doubt, they are urged to do so.); *U. S. v. Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993); *Friedman v. U. S.*, 381 F.2d 155, 160 (8th Cir. 1967); *Nanfeto v. U. S.*, 20 F.2d 376, 378 (8th Cir. 1927); *U. S. v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992); *U. S. v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974); *Holland v. U. S.*, 209 F.2d 516, 523 (10th Cir. 2001); *U. S. v. Daniels*, 986 F.2d 451 (11th Cir. 1993) opinion readopted on rehearing, 5 F.3d 495 (11th Cir. 1993); *U.S. v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993).

¹⁵⁷ Regarding unpreserved errors, RCr 10.26 and KRE 103 allow reversal based on unpreserved, palpable error when a manifest injustice occurs. For example, when an error threatens a defendant’s entitlement to due process of law, *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009), when the error seriously affects the fairness of the proceedings, *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005), when the

17. Failure to require findings on non-statutory aggravators violated KRS 532.025(3), the 6th Amendment right to a jury and 14th Amendment due process; a new sentencing is required.

Preservation. This issue is preserved by defense tender of proposed instructions, including Verdict Forms, Section A, “Findings of Fact Concerning Aggravating Circumstances,” reading as follows: We, the Jury, find beyond a reasonable doubt that the following aggravating circumstance exists in this case as to the murder of Frank Brady: [followed by ten blank lines to be filled in by the jury].”¹⁵⁸ It is further preserved by the introductory sentence at the top of defense-tendered Verdict Form No. 3, which states, “The following punishments listed in Verdict Forms 3 – 5 may not be imposed unless you have found the aggravating circumstance listed in Section A, to have been proven beyond a reasonable doubt, and have indicated, in writing, the aggravating circumstance.”¹⁵⁹

Argument. The Commonwealth introduced a great deal of evidence that could have been interpreted by the jury as non-statutory aggravating circumstances: additional murders for which Appellant had not been convicted at the time of Frank Brady’s death, the murder of Tim Keeling, the widow Keeling’s victim impact evidence, forcing Mr. Stephens to kneel with a gun to his head, chilling factual details regarding Appellant’s prior convictions that should have been excluded under *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011), including Appellant’s response that it was “hard” to kill Mary Louise Smith because she put a coat over her head and testimony by Dennis Reese that

defect in the proceeding is shocking or jurisprudentially intolerable, *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), when the error seriously affects the fairness, integrity, or public reputation of the proceeding, *Id.* at 4, and when a reviewing court determines there is a substantial possibility that the result in the case would have been different but for the error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

¹⁵⁸ Defendant’s Requested Instructions, Verdict Forms, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

¹⁵⁹ Defendant’s Requested Instructions, Verdict Form No. 3, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

Appellant said killing a human being was no harder than killing a dog.

Appellant's jury was told in Instruction No. 1 "You have received additional evidence from which you shall determine whether there are mitigating or aggravating **circumstances** bearing upon the question of punishment, following which you shall fix a sentence for the Defendant."¹⁶⁰ Because Instruction No. 1 used the word "circumstances," plural, it told the jury to search all the evidence to determine whether there were multiple aggravating circumstances. This instruction was permissible because juries in Kentucky are permitted to base a death sentence on non-statutory aggravation. See *Jacobs v. Commonwealth*, 870 S.W.2d 412, 419 (Ky. 1994) (allowing death sentence based on attempted rape).

But KRS 532.025(3) required all aggravating circumstances, plural, relied on by the jury to be in writing signed by the jury foreman:

The jury, if its verdict be a recommendation of death, ... shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

Under KRS 532.025(3) the jury should also have been instructed that if it found aggravating "circumstances," plural, it had to find those circumstances unanimously and beyond a reasonable doubt. See also *Ring v Arizona*, 536 U.S. 584 (2002) (lack of jury determination of aggravating factors supporting death violated 6th Am. right to jury trial). A death sentence can be based on non-statutory aggravation under *Jacobs*. 870 S.W.2d at 419. Yet nowhere in the instructions was the jury required to make any findings with respect to non-statutory aggravators.

In *Brown v. Sanders*, 546 U.S. 212, 218-19 (2006), the Court stated that due

¹⁶⁰ Jury Instructions, TR3-IV, 552, at Tab 7 (emphasis added).

process will mandate reversal of death sentence if the presence of an invalid sentencing factor allows the sentencer to consider evidence that would not otherwise be before it. Jury findings on aggravators were implicitly required under *Sanders*, because without findings, there is no way for an appellate court to determine whether the jury drew adverse inferences and imposed death based on conduct one or more of them deemed to be aggravation but which was actually constitutionally protected, irrelevant, or which should have militated in favor of a lesser penalty:

... due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty." Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it.⁴

Brown v. Sanders, 546 U.S. 212, 218-19 (2006) (internal citations omitted)

Many or all of the aggravating circumstances listed above were irrelevant to the jury's decision to impose death on Appellant, including all the erroneously admitted *Mullikan* evidence and the murder of Tim Keeling, which had not even been charged against Appellant. Yet, Instruction No. 1 invited the jury to search for aggravating circumstances, plural, and to consider whether they bore upon the question of Appellant's punishment. There is no way to know, without any instructions or written jury findings, which non-statutory conduct jurors found to be aggravating enough to support a death sentence. There is no way to know non-statutory aggravation was found unanimously or beyond a reasonable doubt. Under KRS 532.025(3), *Ring*, and *Sanders* a new sentencing trial is required.

18. Failure to explain mitigators, standard of proof, sympathy, and mercy violated the 8th Amendment and due process.

Preservation. This issue is partially preserved by the defense tender of a two-page instruction on mitigation, No. 3.¹⁶¹

Facts. The jury could have believed from Appellant's testimony that it was Reese's idea to escape and Reese's idea to break into the Stephens' residence in Oklahoma. The jury could have believed Appellant prevented harm to Vernon Stephens and his mother and that he did not accompany Reese to Denver or New Mexico. The jury could have believed that Appellant was not the shooter, that Reese shot and killed Frank Brady. Moreover, at least one juror—if properly instructed—might have been swayed to vote for a sentence less than death based on the following additional mitigation:

1. Appellant's childhood in a dysfunctional family as described by the attorney Don Ed Payne,
2. Bylynn's residual positive feelings for Appellant, and
3. Bob Wallace, the Bryan County jailer's testimony.

A juror who was properly instructed who had doubts about Reese's credibility might have been moved by Don Ed Payne's testimony that Appellant had never before been accused of violence against a stranger.¹⁶² A properly instructed juror might have voted for less than death based on Payne's description of Appellant's family. "They were poor, extremely poor... small towns have families like this, a notorious family, emotional people, not educated people...[people with] family disagreements and affiliations full of

¹⁶¹ Defendant's Requested Instructions, No. 3, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

¹⁶² CD3 Trial, 10/27/11, 9:44:11 – 9:50:31 and 9:52:02.

emotion and volatility.”¹⁶³ Bylynn testified that even though she didn’t want to get involved in Appellant’s case and wanted to get on with her life, her time with Appellant would never be “a closed chapter.”¹⁶⁴ By that she explained, “I was at the time married to him... never forget it the rest of [my] life.”¹⁶⁵

Bylynn was still in contact with Appellant in 1998 when her deposition was taken, and still corresponding with him “a little bit.” She had contacted the prosecutors to get back mementos of her life with Appellant, including family video tapes. She had never contacted the prosecutors offering to testify against Appellant; the prosecutors had contacted *her*.¹⁶⁶ At least one juror, properly instructed, could have felt that if Bylynn still cared for Appellant after everything that had happened, it showed enough goodness and humanity in Appellant that his life should be spared.

In addition, when Bob Wallace, the jail supervisor from Oklahoma took the stand, looked over, and saw Appellant sitting at counsel table, he broke into a big smile and said, “Michael, you sure have changed! More weight, less hair!”¹⁶⁷ This was a very telling moment in the courtroom, a moment the jury could not have missed. This apparently involuntary positive reaction to seeing Appellant again after a period of many years, to a properly instructed juror, could have been enough to spare Appellant’s life. Clearly Wallace did not consider Appellant all bad. Clearly Wallace held some affection for Appellant, even knowing Appellant’s history.

The trial court’s failure to instruct on the mitigating evidence present in the case,

¹⁶³ CD3 Trial, 10/27/11, 9:51:13.

¹⁶⁴ CD3 Trial, 10/25/11, 3:49:39.

¹⁶⁵ CD3 Trial, 10/25/11, 3:53:40.

¹⁶⁶ CD3 Trial, 10/25/11, 3:50:21 – 3:51:52.

¹⁶⁷ CD3 Trial, 10/24/11, 10:22:59.

and on the role of pity, sympathy, and mercy, constituted an error to the substantial prejudice of Appellant under *Smith* and the federal authorities on which *Smith* relies. Nowhere do the instructions define “mitigating circumstances” or make clear what role such evidence plays in causing the jury to decline to impose the death penalty. This is a violation of federal due process. *Smith v. Commonwealth*, 845 S.W.2d 534, 538-539 (Ky. 1993). (holding that the language of KRS 532.025 clearly states the judge *shall* include instructions to the jury regarding mitigating circumstances). The U.S. Constitution requires that “there is no reasonable possibility that the jury misunderstands its role in the capital sentencing procedure or misunderstands the meaning and function of mitigating circumstances.” *Peek v. Kemp*, 784 F.2d 1479, 1493-1494 (11th Cir. 1986). In the case at bar, the jury was never even told that “mitigating” circumstances mean “that the law recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment.” *Id.* at 1494.

The jury must be told that it is allowed to base its decision to reject death on sympathy for the defendant. “The jury is permitted to consider mitigating evidence relating to the defendant’s character and background precisely because that evidence may arouse ‘sympathy’ or ‘compassion’ for the defendant.” *People v. Lanphear*, 680 P.2d 1081, 1083 (Cal. 1984). “This constitutionally mandated freedom to respond to sympathy aroused by mitigating evidence . . .” was not permitted by the court’s instructions. *Id.* at 1084. Appellant’s sentencing hearing, where almost no evidence was introduced, “clearly focused on the issue of mercy.” *Presnell v. Zant*, 959 F.2d 1524, 1530 (11th Cir. 1992).

Further, the instructions failed to specify the standard of proof regarding mitigation. The court should have instructed the jurors to find mitigation (including but

not limited to the possibility that Dennis Reese and not Appellant was the shooter) if it was supported by “any evidence” or a “preponderance of the evidence,” or “if you believe [it] to be true.” Standards of proof and their precise delineation to the fact finder are indispensable components of the law. *Addington v. Texas*, 441 U.S. 418 (1979). In the absence of instructions guiding the jurors in their use of mitigation, there is more than a substantial probability that jurors erroneously believe the burden is on a defendant to prove a mitigating factor beyond a reasonable doubt.

19. Erroneous instructions requiring a unanimous jury finding on mitigation violated the 8th and 14th Amendments.

Facts. Instruction No. 3, Mitigating Circumstances states as follows:

In fixing a sentence for the Defendant for the offense of MURDER, you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence as you believe to be true. You shall consider those aspects of the Defendant’s character, and those facts and circumstances of the particular offense of which he has been found guilty, which you believe from the evidence to be true. If you believe it to be true you shall additionally consider the following:

(1) Whether the defendant was an accomplice in the offense committed by another person and his participation in the offense itself was by comparison relatively minor;

AND/OR

(2) Any other circumstance or circumstances arising from the evidence which you, the Jury, deem to have mitigating value.¹⁶⁸

Preservation. This issue is preserved by defense tender of the two-page instruction on mitigation, Defense Instruction No. 3.¹⁶⁹

Argument. When the first part of No. 3 uses the word “you,” it could be interpreted as speaking to each juror individually, informing each juror to consider the

¹⁶⁸ Jury Instructions, TR3-IV, 553, at Tab 7.

¹⁶⁹ Defendant’s Requested Instructions, No. 3, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

mitigating facts that juror believes to be true. But the last part of No. 3 eliminates this reading by making it clear that “you” throughout the instruction means “you, the Jury,” and not you, the individual juror. Instruction No. 3 requires that whatever circumstance is deemed mitigating must be deemed mitigating by the entire “Jury.” This has been held by the U.S. Supreme Court to violate the 8th and 14th Amendments. *Mills v. Maryland*, 486 U.S. 367, 374, 384 (1988), citing, *inter alia*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

“An instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). But Instruction No. 6, by stating that “[t]he verdict of the Jury must be unanimous and must be signed by one of you as Foreperson” simply reinforces the unanimity requirement for any part of the verdict by “the Jury.”¹⁷⁰

Each individual juror must be allowed to determine whether mitigating circumstances exist and consider it on their own. *Mills*, 486 U.S. at 384. In *Mills*, the death sentence was vacated because there was a “substantial probability” under the court’s instructions that the jurors “may have thought they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstance.” Because this situation existed, a juror could have been precluded from giving mitigating evidence any effect whatsoever, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978) and its progeny. The 6th Circuit has ruled similarly. *Gall v. Parker*, 231 F3d 265 (6th Cir. 2000); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110-11 (6th Cir. 1990) (en banc).

The Supreme Court reaffirmed *Mills* in *McCoy v. North Carolina*, 494 U.S. 433

¹⁷⁰ Jury Instructions, TR3-IV, 557, at Tab 7.

(1990). *McCoy* makes it clear that the constitutional infirmity in *Mills* was based on the jurors' inability to give any mitigating effect to the defendant's mitigation evidence unless they were unanimous in finding that evidence. *Id.*, 494 U.S. at 439. In reviewing the instructions in *Mills*, 486 U.S. at 376, the Supreme Court looked to what interpretation a "reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." The constitutional standard for reviewing instructions is not what a court declares the instructions to mean but what a reasonable juror could have understood them to mean. *Id.* Any doubt about the meaning of an instruction in a death penalty case has to be resolved in favor of the accused. *Id.* at 378.

In *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989), the Court held that because juries are likely to act as a unit in sentencing, the danger of a tainted sentence is high when jurors are "never expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, [the defendant] would not be sentenced to death." The instructions in *Kubat*, as here, stressed unanimity and created the substantial possibility that jurors were precluded from properly considering mitigation due to a mistaken belief that mitigators had to be found unanimously. *See State v. McNeil*, 395 S.E.2d 106 (N.C. 1990).

Penalty phase instructions must be "sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones ... [The jury's] sentencing discretion ... [must be] guided and channeled ..." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) mandates "careful instructions on the law and how to apply it."

A jury's belief that individual consideration of any mitigation evidence was precluded unless it was unanimously accepted prevented consideration of constitutionally relevant evidence. See *Boyde v. California*, 494 U.S. 370, 380 (1990). In requiring juror unanimity, the penalty phase instructions violated Appellant's constitutional right to have his jury consider his mitigation evidence without state-erected procedural impediments to that consideration. U.S. Const. amend. 6, 8, 14 and Ky. Const. § 7, 11, 17. Reversal is required.

In December, 2011, the American Bar Association (hereinafter ABA) released "The Kentucky Death Penalty Assessment Report."¹⁷¹ In Chapter 10, Capital Jury Instructions, the ABA noted that capital jurors in the Commonwealth are not always given adequate guidance in their decision whether a defendant should live or die.¹⁷²

15.6% of interviewed Kentucky capital jurors failed to understand that aggravating circumstances needed to be found beyond a reasonable doubt. Moreover, high percentages of these jurors misunderstood the guidelines for considering mitigating evidence. In particular, 45.9% of these jurors 'failed to understand . . . that they [could] consider any mitigating evidence' while 61.8% of these jurors 'incorrectly thought [that] they had to be convinced beyond a reasonable doubt on findings of mitigation.' Finally, 83.5% of these jurors 'failed to realize [that] they did not have to be unanimous on findings of mitigation,' despite the U.S. Supreme Court's decision in *Mills v. Maryland* [486 U.S. 367 (1988)] that held that such unanimity is not required.

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

A major recommendation for Kentucky is to revise jury instructions given in

¹⁷¹ http://www.abanow.org/wordpress/wp-content/files_flutter/1323199256kydeathpenaltyreport_120711.pdf (last visited on 12/17/12)

¹⁷² Chapter 10 of the ABA report is included at Tab 9.

capital cases. ABA Report, 308. The ABA recommends that jury instructions should tell the jury (1) what mitigation means, and that the finding of mitigating circumstances does not have to be unanimous and is not subject to the beyond the reasonable doubt standard, ABA Report 311, 314-315; (2) that a non-death verdict is possible even if aggravators are found and no mitigators, *Id.* at 315-316; and (3) parole and consequences of verdict, *Id.* at 311-314. This Court should reconsider the instruction and mitigation issues in light of the ABA report and reconsider these issues.

20. Failure to require written mitigation findings violated KRS 532.025 and the 8th and 14th Amendments.

Preservation. Unpreserved.

Argument. The sentencing authority's discretion, as exercised by both jury and judge, must be "guided and channeled by requiring examination of specific findings that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). Written jury findings regarding mitigation are essential to "meaningful appellate review." *Proffitt*, 428 U.S. at 251 (approving Florida's statute requiring written findings). Procedures in the trial court must "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Indeed, Kentucky's statute arguably requires such findings. "[T]he judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist." KRS 532.025 (1) (b).

Only with written findings can an appellate court determine whether the trial court "viewed the issue of life or death within the framework of the rules provided by statute." *Lucas v. State*, 568 So.2d 18, 24 (1990). Unfortunately, under *Smith v. Commonwealth*,

599 S.W.2d 900, 912 (Ky. 1980), Appellant's jury was not required to note which mitigators were found to exist and which were rejected. *Smith* violates *Proffitt*, and should be overruled. This Court should also overrule *Bowling v. Commonwealth*, 942 S.W.2d 293, 306 (Ky. 1997), *overruled on other grounds in McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (holding that the trial court was not required to make specific findings of mitigating factors). This Court should reconsider its holding in *Bowling v. Commonwealth*, 942 S.W.2d 293, 306 (Ky. 1997), *overruled on other grounds in McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (holding that the trial court was not required to make specific findings of mitigating factors).

21. Neither the jury nor the judge were properly channeled in sentencing; the 8th and 14th Amendments were violated.

Preservation. This issue is partially preserved by the defense-tendered instructions, which focused the jury on considering mitigation far better than the instructions given by the court.¹⁷³ As to the judge's role, the issue is unpreserved.

Facts. Verdict Form 1 allows the jury to fix Appellant's punishment at a term of years. Verdict Form 2 allows the jury to fix the punishment at life. But only Verdict Form 3 mentions the aggravator.¹⁷⁴

Argument. The verdict forms channeled the jury away from considering mitigation and toward a verdict of death. The court's role in sentencing was then left 100% undefined and unarticulated, and the court was left to determine Appellant's sentence in its sole *unguided* discretion.¹⁷⁵ Only Form 3 appears to pertain if the jury has found the aggravator to be true. A jury moving through these forms one-by-one would first consider

¹⁷³ Defendant's Requested Instructions, TR3-I, 137-150 and TR3-II, 151-152 at Tab 6.

¹⁷⁴ *Id.*

¹⁷⁵ CD3 Hearings, 11/16/11, 9:42:30 – 9:43:00.

a term of years. Next it would consider a life sentence. Then it would come to Form 3 and since it had at this point already been instructed to presume the aggravator was true, probably fix a death sentence or LWOP25, the only sentences it had not already rejected. See *Nolte v. State*, 892 P.2d 638, 645 (Okla. Cr. 1994) (addressing the same verdict form sequencing error, finding that the forms neither guided nor channeled the jury's discretion and remanding for resentencing).

The jury should have been provided with one verdict form that allowed the foreman to write in what aggravating factor(s), if any, the jury found beyond a reasonable doubt, followed by four separate verdict forms each setting out one of the four sentences authorized in KRS 532.025 (3) and KRS 532.030(1). See *Thomas v. Commonwealth*, 864 S.W.2d 252, 264 (Ky. 1993), *overruled on other grounds in Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006) *overruled by Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) concurring and dissenting in *Thomas*). Without the use of such verdict forms, "the jury is funneled into fixing one of the aggravated penalties, rather than retaining the option to fix a lesser penalty." *Id.* This Court should overrule its holding in *Foley v. Commonwealth*, 942 S.W.2d 876, 888-889 (Ky. 1996), that a defendant is not prejudiced by such an imperfection in the verdict form. Appellant's sentence should be vacated and his case remanded for resentencing. 6th, 8th, and 14th Amends., U.S. Const.; Sections 2, 7, 11, and 17, Ky. Const.

The judge's role was also unchanneled.

In *Matthews v. Commonwealth*, 709 S.W.2d 414, 423 (Ky. 1986), this Court held that "the statutory scheme not only permits, but anticipates, that the trial court will play a separate and different role in sentencing in capital cases after the jury's verdict has been

received.” But this Court has never said what that role is, and no court has ever exercised its responsibility by overruling a jury recommendation of death. Here the court based its decision to impose death on Appellant’s four prior murders, including two that Appellant had not been convicted of, and laid special emphasis on Appellant’s supposed murder of Tim Keeling, a crime neither charged nor proven. The jury was *steered* to death, and the judge provided no guidance whatsoever.

The verdict forms influenced the jury away from considering the lower penalties and encouraged it to give less than full consideration to mitigation. As can be seen by the Report of Trial Judge, the court then ignored mitigation virtually entirely and appears to have based its decision heavily on Appellant’s past history. The instructional format channeled the jury to death and the lack of definition of the judge’s role violated Appellant’s right to a fair trial, due process, and reliable sentencing under *Furman v. Georgia*, 408 U.S. 238 (1972). See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Gregg v. Georgia*, 428 U.S. 153, 193 and 195 (1976) (sentencer must have adequate information and guidance).

22. Failure to instruct on consequences of the verdict and information on parole violated the 6th, 8th, and 14th Amendments.

Preservation. This issue is unpreserved.