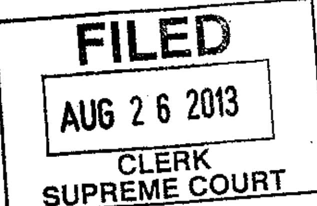
FILED
AUG 26 2013
CLERK
SUPREME COURT

RECEIVED
AUG 26 2013
CLERK
SUPREME COURT

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

Reply Brief for Appellant St. Clair

Susan J. Balliet
Robert C. Yang
Samuel N. Potter
Assistant Public Advocates
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Ky 40601
(502) 564-8006

Counsel for Appellant St. Clair

Certificate of Service:

I hereby certify that a copy of the foregoing Reply Brief 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, KY40202-3209; the Hon. Justin Brown, 436 South 7th Street, Suite 100, Louisville, KY 40203; and the Hon. Wm. Robert Long, Jr., Assistant Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601, on August 26, 2013. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

Susan J. Balliet

PURPOSE OF BRIEF

This reply brief responds to selected issues raised by Appellee. All arguments not addressed here are adequately refuted in the Brief for Appellant.

ISSUES TO BE ADDRESSED

1. Response to Appellee's preliminary argument:
   a. The standard of review for unpreserved error in death penalty cases on direct appeal is the *Sanders* standard.
   b. *Sanders* does not allow waiver of unpreserved claims in a death penalty appeal.
   c. Constitutional errors, preserved and unpreserved, must be shown to be harmless beyond a reasonable doubt.
2. (Appellant's Original Brief Issue 1) Clarification of CBLA argument.
3. (Appellant's Original Brief Issue 2) KRE 404(b) issues – the law of the case doctrine does not preclude review of this issue due to an intervening change in the law.
4. (Appellant's Original Brief Issue 3) Comely identification issue.
5. (Appellant's Original Brief Issue 4) The Court's rules of procedure for *voir dire* are mandatory; St. Clair's waiver was required. The Jefferson County method of jury selection is a substantial deviation and there is no justification explaining how it would benefit Appellant more than this Court's method.
6. (Appellant's Original Brief Issue 6) Trial court failed to strike Jurors 15, 16, and 448.
7. (Appellant's Original Brief Issue 7) The *Batson* issue is adequately preserved by *pro se* standards. No justification or trial strategy appears for excusing the one juror who most closely shared Appellant's socio-economic status.
8. (Appellant's Original Brief Issue 8) Jurors and minimum wage.
9. (Appellant's Original Brief Issue 9) Tim Keeling's victim impact statement violated Appellant's rights and was irrelevant.
10. (Appellant's Original Brief Issue 10) Evidence concerning Appellant's prior convictions violated *Mullikan* and due process.

11. (Appellant's Original Brief Issue 13) The prosecutor told the jury prior to their deliberations to **disregard** all the penalties listed in the jury instructions except the death penalty. This was the same as telling the jury not to consider mitigation, in violation of *Lockett*.

12. (Appellant's Original Brief Issues 14-19 and 21) A defense tender of jury instructions preserves an argument on appeal regarding court instructions that differ from the tendered instructions.

13. (Appellant's Supplemental Issue 32) Retroactive application of overruling *Thompson* in order to use St. Clair's prior convictions as aggravators.

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF i

ISSUES TO BE ADDRESSED i

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) i

KRE 404(b) i

Batson v. Kentucky, 476 U.S. 79 (1986) i

Mullikan v. Commonwealth, 341 S.W. 3d 99 (Ky. 2011) i

Lockett v. Ohio, 438 U.S. 586 (1978) ii

Thompson v. Commonwealth, 862 S.W.2d 871 (Ky. 1993) ii

STATEMENT OF POINTS AND AUTHORITIES ii

ARGUMENT 1

1. Response to preliminary argument 1

a. This Court applies the *Sanders* standard to unpreserved error in death penalty cases. 1

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) 1, 2, 3

West v. Seabold, 73 F.3d 81 (6th Cir. 1996) 2

Wainwright v. Sykes, 433 U.S. 72 (1977) 2

Willis v. Smith, 351 F.3d 741 (6th Cir. 2003) 2

Strickland v. Washington, 466 U.S. 668 (1984) 2

West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989) 2, 3

b. Unpreserved error is not subject to waiver under *Sanders*. 2

RCr 10.26 2

Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987) 3

Roper v. Simmons, 543 U.S. 551 (2005) 3

This Court presumes prejudice when unreliable evidence violates Due Process. 3

Potts v. Commonwealth, 172 S.W.3d 345 (Ky. 2005) 3

Manson v. Brathwaite, 432 U.S. 98 (1977) 3

Neil v. Biggers, 409 U.S. 188 (1972) 3

Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012) 3

Harp v. Commonwealth, 266 S.W.3d 813 (Ky. 2008) 3

McKinney v. Heisel, 947 S.W.2d 32 (Ky. 1997) 3

c. Constitutional errors, preserved and unpreserved, must be shown to be harmless beyond a reasonable doubt. 3

All constitutional errors must be shown harmless beyond a reasonable doubt. 3

Chapman v. California, 386 U.S. 18 (1967) 3, 4

Miller v. Commonwealth, 391 S.W.3d 857 (Ky. 2013) 3

Meece v. Commonwealth, 348 S.W.3d 627 (Ky. 2011) 3

Wright v. Commonwealth, 239 S.W.3d 63 (Ky. 2007) 3

Neder v. United States, 527 U.S. 1 (1999) 3, 4

Jones v. United States, 527 U.S. 373 (1999) 4

Rose v. Clark, 478 U.S. 570 (1986) 4

Payne v. Tennessee, 501 U.S. 808 (1991) 5

Green v. Georgia, 442 U.S. 95 (1979) 5

Chambers v. Mississippi, 410 U.S. 284 (1973) 5

Ege v. Yukins, 485 F.3d 364 (6th Cir. 2007) 5

Rogers v. Commonwealth, 86 S.W.3d 29 (Ky. 2002) 5

2. Clarification of CBLA argument. 5

RCr 10.02 5

RCr 10.06(1) 5

RCr 60.02 5

United States v. Sebbern, 10 CR 87 SLT, 2012 WL 5989813 (E.D.N.Y. Nov. 30, 2012). 7

Harper v. Commonwealth, 978 S.W.2d 311 (Ky. 1998) 7

Strickler v. Greene, 527 U.S. 263 (1999) 8

3. KRE 404(b) evidence - the law of the case doctrine does not preclude review of this issue due to an intervening change in the law. 8

Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010) 8

Arizona v. California, 460 U.S. 605 (1983)... 8

St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) (*St. Clair I*)............................. 8

KRE 404(b).. 8

Crawford v. Washington, 541 U.S. 36 (2004) 8, 9

U.S. Const. Amend. VI 8

Ohio v. Roberts, 448 U.S. 56 (1980)... 8, 9

4. Comely identification issue... 9

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) 9, 10

Harper v. Commonwealth, 978 S.W.2d 311 (Ky. 1998) 9

Strickler v. Greene, 527 U.S. 263 (1999) 9

Jackson v. Commonwealth, 319 S.W.3d 343 (Ky. 2010) 9

Ky. Const. § 110(2)(b) 10

KRS 532.030.. 10

KRS 532.040.. 10

RCr 11.02... 10

U.S. v. Goodwyn, 596 F.3d 233 (4th Cir.2010) 10

Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010) 10

RCr 10.26... 10

Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2010)... 10

***5. St. Clair's waiver of voir dire* procedure was required.** 10

Benton v. Commonwealth, 2011-SC-000411-MR, 2013 WL 1188006 (Ky. Mar. 21, 2013) 10, 11

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) 11

Robertson v. Commonwealth, 597 S.W.2d 864 (Ky. 1980)... 11

Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006) 12

Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007) 12

Arizona v. Fulminante, 499 U.S. 279 (1991) 12
Neder v. United States, 527 U.S. 1 (1999) 12
Kentucky's Administrative Procedures of the Court of Justice 12
Evitts v. Lucey, 469 U.S. 387 (1985) 12
Pulley v. Harris, 465 U.S. 37 (1984) 12
6. Jurors 15, 16, and 448. 12
Ordway v. Commonwealth, 391 S.W.3d 762 (Ky. 2013) 12, 13
7. *Batson* violation. 13
Batson v. Kentucky, 476 U.S. 79 (1986) 13
Cruz v. Beto, 405 U.S. 319 (1972) 13
Haines v. Kerner, 404 U.S. 519 (1972) 13
Million v. Raymer, 139 S.W.3d 914 (Ky. 2004) 13
Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) 13
McKoy v. North Carolina, 494 U.S. 433 (U.S.N.C. 1990) 14
U. S. Const. Amend. XIII 14
U.S. Const. Amend. VI 14
U.S. Const. Amend. XIV 14
Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 14
8. Jurors and Minimum Wage. 14
United States v. Kozminski, 487 U.S. 931 (1988) 14
Hurtado v. United States, 410 U.S. 578 at fn. 11, (1973) 14
U.S. Const. Amend. VI 14
9. Introduction of victim impact testimony from Tim Keeling's spouse violated the 14th Amendment, KRS 532.055(2)(a)(7), and was irrelevant. 15
Jackson v. Commonwealth, 319 S.W.3d 347 (Ky. 2010) 15
Case v. Commonwealth, 467 S.W.2d 367 (Ky. 1971) 15
Jacobsen v. Commonwealth, 376 S.W.3d 600 (Ky. 2012) 15
KRS 532.055(2)(a)(7) 15
U.S. Const. Amend. VIII 15
Payne v. Tennessee, 501 U.S. 808 (1991) 15, 16
Dawson v. Delaware, 503 U.S. 159 (1992) 16

Gray v. Commonwealth, 203 S.W.3d 679 (Ky. 2006) 16
Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931) 16
U.S. Const. Amend. XIV 16
10. Prior conviction evidence violated *Mullikan* and due process. 17
Jacobsen v. Commonwealth, 376 S.W.3d 600 (Ky. 2012) 17, 18
KRE 404(b) 17, 18
St. Clair v. Commonwealth, 140 S.W.3d 510, 535-36 (Ky. 2004) (*St. Clair I*) 17
Blane v. Commonwealth, 364 S.W.3d 140 (Ky. 2012) 18
11. Asking the jurors to disregard all penalties except death constituted prosecutorial misconduct. 18
Lockett v. Ohio, 438 U.S.586 (1978) 19
Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc) 19
Caldwell v. Mississippi, 472 U.S. 320 (1985) 19, 21, 22
Hitchcock v. Dugger, 481 U.S. 393 (1987) 20, 22
Young v. J.B. Hunt Transp., Inc., 781 S.W.2d 503 (Ky. 1989) 21
King v. Ford Motor Co., 209 F.3d 886 (6th Cir. 2000) 21
Collins v. Galbraith, 494 S.W.2d 527 (Ky. App. 1973) 21
Penry v. Lynaugh, 492 U.S. 302 (1989) 21
Atkins v. Virginia, 536 U.S. 304 (2002) 21
Morgan v. Illinois, 504 U.S. 719 (1992) 21
Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 21, 22
U.S. Const. Amend. VI 22
U.S. Const. Amend. VIII 22
U.S. Const. Amend. XIV 22
12. Jury Instruction Issues 22
Eversole v. Commonwealth, 550 S.W.2d 513 (Ky. 1977) 22
RCr 9.54(2) 22
Pollini v. Commonwealth, 172 S.W.3d 418 (Ky. 2005) 22
Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990) 22
13. Retroactive application of overruling *Thompson* in order to use St. Clair's prior convictions as aggravators. 22

St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) (*St. Clair I*) 23
Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010) 23
Thompson v. Commonwealth, 862 S.W.2d 871 (Ky. 1993) 23
CONCLUSION 23

ARGUMENT

1. Response to preliminary argument.

a. This Court applies the *Sanders* standard to unpreserved error in death penalty cases.

The Court's standard of review for unpreserved error on direct appeal in death penalty cases is a straightforward two-part inquiry to determine whether there is justification for counsel's failure to object, and if not, whether the defendant has suffered prejudice:

> Except where the trial court has a duty to intervene *sua sponte* to prevent manifest injustice, considerable semantic agility is required in order to assign error to the court respecting issues with which it has not been presented.[FN1] Where the death penalty has been imposed, we nonetheless review allegations of these quasi errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. *Cosby v. Commonwealth,* Ky., 776 S.W.2d 367 (1989) [*overruled on other grounds by St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)]; *Ice v. Commonwealth,* Ky., 667 S.W.2d 671 (1984). All unpreserved issues are subject to this analysis.
>
> [FN1] Generally, once a judgment has become final, such issues constitute a collateral attack upon the judgment imposing sentence, and must be presented to the trial court pursuant to RCr 11.42.

Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1990)

Appellee presents a confusing mish-mash by mixing up post-conviction "ineffective assistance" and federal habeas "cause and prejudice" standards with the *Sanders* standard. Ineffective assistance and federal habeas standards (and hence all the federal decisions the

Commonwealth cites at page 6 of its brief) are irrelevant, including *West v. Seabold,* 73 F.3d 81 (6th Cir. 1996).

Federal habeas petitioners who have failed to comply with certain state preservation rules – specifically, *only* the rules the federal court determines are "firmly established and regularly followed"-- must meet federal "cause and prejudice" standards in order to obtain review of defaulted state claims in federal court. *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977); *Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003); *West v. Seabold*, 73 F.3d at 84. This Court does not concern itself with federal concepts like "firmly established and regularly followed," "cause and prejudice" or federal "default" in deciding direct appeals. At this stage, trial counsel's decisions are not "presumed reasonable" under *Strickland v. Washington*, 466 U.S. 668 (1984) because at this stage the federal *Strickland* standard that may apply later in post-conviction is also irrelevant. **This Court should completely disregard** Appellee's repeated citing of *West v. Commonwealth,* 780 S.W.2d 600 (Ky. 1989), *habeas corpus relief denied, sub nom. West v. Seabold,* 73 F.3d 81 (6th Cir. 1996) because non-capital palpable error cases and federal habeas cases such as these are irrelevant.

b. Unpreserved error is not subject to waiver under *Sanders*.

Sanders suggests in the first sentence of the block quote above that palpable error review under RCr 10.26 may apply in a death case as well as a non-death case, when error is so "manifest" that it should be addressed "*sua sponte.*" But contrary to Appellee's argument, *West v. Commonwealth,* 780 S.W.2d 600 (Ky. 1989) does not provide authority for **waiver** of unpreserved claims in a death case, because *West* is not a death case and waiver of an unpreserved death claim was not at issue. In *West,* a claim of

palpable error was found waived by failure to move for mistrial following an objection and admonition. If *West* had been a death case, the *Sanders* standard would have applied. Because "death is different," *Sanders* review is not subject to waiver. It is not clear why Appellee cites *Stanford v. Commonwealth,* 734 S.W.2d 781 (Ky. 1987), abrogated eight years ago by *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the juvenile death penalty).

This Court presumes prejudice when unreliable evidence violates Due Process. *See Potts v. Commonwealth*, 172 S.W.3d 345, 348-49 (Ky. 2005) citing *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977) and *Neil v. Biggers,* 409 U.S. 188, 199 (1972) (reliability of evidence is critical factor in determining its admissibility).

It is also "a rule of longstanding and frequent repetition" that **erroneous instructions to the jury are presumed to be prejudicial**; that an appellee claiming harmless error bears a steep burden of showing affirmatively that no prejudice resulted from the error. *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012); *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008); *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997).

c. Constitutional errors, preserved and unpreserved, must be shown to be harmless beyond a reasonable doubt.

All constitutional errors must be shown harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Unpreserved constitutional errors as well as preserved constitutional errors are subject to harmless-error analysis. *Miller v. Commonwealth*, 391 S.W.3d 857, 868-69 (Ky. 2013); *Meece v. Commonwealth,* 348 S.W.3d 627 (Ky. 2011); *Wright v. Commonwealth,* 239 S.W.3d 63, 66 (Ky. 2007) (*citing, Neder v. United States*, 527 U.S. 1, 12-13 (1999). The test "is whether it appears 'beyond

a reasonable doubt that the error complained of did not contribute to the verdict ....'" *Neder,* 527 U.S. at 15 (*quoting, Chapman v. California,* 386 U.S. 18, 24 (1967).

The harmless-beyond-a-reasonable-doubt standard applies to both preserved and unpreserved constitutional error. Contrary to Appellee's assertion, the United States Supreme Court in upholding a federal death sentence in *Jones v. United States,* 527 U.S. 373, 388-395, 402-405 (1999) reviewed a case in which the 5th Circuit expressly stated that the harmless-beyond-a-reasonable-doubt standard **did apply**. The Court agreed, and in upholding the 5th Circuit, the Supreme Court likewise stated "[w]e think it plain... that the error indeed was harmless beyond a reasonable doubt." *Jones,* at 404.

Appellee mis-quotes *Rose v. Clark,* 478 U.S. 570 (1986). What *Clark* really says at page 576 supports St. Clair: "And since *Chapman,* "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if...**the constitutional error was harmless beyond a reasonable doubt**." (emphasis added). On pages 576-577 instead of Appellee's claimed quote there is a long discussion of *Chapman v. California,* 386 U.S. 18 (1967) (establishing the harmless beyond a reasonable doubt standard). Appellee's quote --"[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied..."—finally does appear at the end of the *Chapman* discussion, at p. 579. But it can only be understood in context, as a follow-up to the *Chapman* discussion. In other words, all that Appellee's quote means is that **once** all constitutional errors are found harmless beyond a reasonable doubt, **then** guilt is established beyond a reasonable doubt and **then** the interest in fairness is satisfied.

Evidentiary errors may violate the federal constitution. *Payne v. Tennessee,*

501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process); *Green v. Georgia,* 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within ... [the state's] hearsay rule... its exclusion constituted a violation of the Due Process Clause ...."); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (holding that hearsay should not have been excluded: "[w]here constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice."); *Ege v. Yukins,* 485 F.3d 364 (6th Cir. 2007) (failure to exclude unreliable bite mark evidence violated due process); *Rogers v. Commonwealth*, 86 S.W.3d 29, 38-39 (Ky. 2002) (permitting reference to a failed polygraph violated Due Process, Compulsory Process, and the Confrontation Clause). St. Clair believes that all the evidentiary violations raised in this appeal are of constitutional magnitude, calling for a new trial.

2. Clarification of CBLA argument.

Appellee correctly points out two things, 1) St. Clair's motion for a new trial based on introduction of CBLA was brought under RCr 10.02 and 10.06(1),[1] and the Commonwealth did not re-introduce the testimony of FBI expert Ernest Peel stating that the bullets in Kentucky were the "same" as the bullets in New Mexico and Oklahoma. The 2009 FBI letter does not name which of its experts introduced CBLA evidence at Appellant's trial in 1998, and counsel mistakenly thought it must have been Crum. Counsel received this impression from the summary of Crum's 1998 testimony presented to the 2011 jury, specifically his statement that he received "four different groups of bullet evidence to

[1] Two stray references to RCr 60.02 in the Brief for Appellant are typos.

examine"[2] followed closely by his [purported] opinion that "these items" were "identical," and were "probably" fired from a .357 Magnum Ruger Blackhawk, a statement attributed to Crum without identifying which bullets were referred to.[3]

Peel did not offer only "cautious, equivocal testimony regarding CBLA" in 1998, as claimed by Appellee. Peel testified that while bullets from the same box exhibit differences, "those differences are not very great….[and] [i]f you're looking at any two pieces of lead and you find that they have the same composition that is what then you would expect if they were in the **same** box" or at least packaged on or about the **same** date.[4] (emphasis added). Agent Peel examined the same bullet evidence that Crum examined[5] and concluded that all the bullets he examined were "very close" in composition except those from Bennett's cruiser.[6] Agent Peel opined that it would "make sense" that all the bullets from the Brady murder, the Keeling murder, and Oklahoma were from the **same** box.[7] (emphasis added). Peel's testimony in 1998 that bullets were the "**same**" was the same as saying the bullets were "**identical**."

By contrast back in 1998 Agent Crum concluded –only--that the Keeling jacket fragment, the Brady jacket, and the Stephens' bullets were all "**similar**,"[8] and that a .357 Magnum Ruger Black Hawk "**could have fired**" both the Keeling and Brady bullets.[9] Crum **did not testify** in 1998 based on his lands and grooves comparison that any Kentucky bullet

[2] Crum described bullet evidence from the Brady murder, the Bennett cruiser, the Keeling murder, and the Stephens residence in Oklahoma. CD3 Trial, 10/24/11, 3:29:20 – 3:31:04 and 10/25/11, 9:02:24 – 9:03:17 – 9:03:54

[3] CD3 Trial, 10/24/11, 3:26:47 – 3:34:05 and 10/25/11, 9:01:49 – 9:02:24.

[4] TE1 XVII, 2055-2118, at page 2100, at Tab 1.

[5] TE1 XVII, 2103 – 2108, at Tab 1.

[6] TE1 XVII, 2109-2110, at Tab 1.

[7] TE1 XVII, 2111, at Tab 1.

[8] TE1 XVII, 2071-2073, 2075, 2077 and 2079, at Tab 1.

[9] TE1 XVII, 2085 and 2086, at Tab 1.

evidence was "identical" or the "same" as any New Mexico or Oklahoma bullet evidence.[10] Crum **did not say** in 1998 that any shots fired in Kentucky were "probably" fired from a .357 Ruger Blackhawk.[11] St. Clair failed to object when the Commonwealth falsely included the words "identical" and "probably" in Crum's 2011 **purported** summary of testimony.

The FBI letter states that science does not support any expert testimony based on chemical composition that two bullet fragments can be inferred to be "identical," or that they came from an "identical" box or source.[12] By **falsely attributing** to Crum the opinion that the groups of bullet evidence were "identical" and falsely changing his opinion from **possibly** to ***probably*** the gun used in Kentucky was a Ruger Blackhawk, the Commonwealth transformed Crum's very limited 1998 opinion into much the same discredited Peel opinion that the bullets that killed Brady were the **"same."** St. Clair objects that his 2011 jury was exposed to the same false science as the 1998 jury, albeit introduced through a falsified testimony summary.

St. Clair also still objects to the fact that CBLA evidence was considered **by his 1998 jury**, and that his 2011 jury was not informed that his 1998 guilt-phase conviction was based on false CBLA science. "[I]n a capital murder trial, all evidence introduced in the guilt phase may be considered by the jury during the sentencing phase," *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998), and guilt phase evidence may have a significant effect on the jurors' choice of sentence. *Strickler v. Greene*, 527 U.S. 263, 305

[10] TE1 XVII, at Tab 1. "Lands and grooves" analysis is now subject to the same challenge as CBLA, i.e., that it lacks scientific basis. *United States v. Sebbern*, 10 CR 87 SLT, 2012 WL 5989813 (E.D.N.Y. Nov. 30, 2012) (questioning the science underpinning lands and grooves analysis and remanding to determine what level of confidence an expert should be allowed to claim for such comparisons) (Unreported, see copy attached at Tab 2).
[11] TE1 XVII, at Tab 1.
[12] FBI letter of 2009, attached to Brief for Appellant at Tab 3.

(1999) (Justice Souter, dissenting). A new guilt phase trial is required, as well as a new sentencing trial.

3. KRE 404(b) evidence - the law of the case doctrine does not preclude review of this issue due to an intervening change in the law.

The law of the case doctrine functions not as a prohibition to review issues but as a tool to enable a court to exercise its discretion. *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). A recognized exception to this rule applies when an intervening change in the law has occurred. *Brown*, 313 S.W.3d at 610. While the Appellee argued no significant change has occurred in this Court's prior bad acts jurisprudence since Appellant's initial opinion in 2004, the Appellee failed to acknowledge the subsequent and readily identifiable trend of exclusionary clarification as set forth in the Brief for Appellant.

The Appellee failed to develop any counterargument that the law has not changed. Notably absent from the Appellee's response is any comparative summary of pre-*St. Clair I* cases reversed due to introduction of similar prior bad acts testimony. No such summary is possible because this Court – since *St. Clair I* – has in fact been clarifying the exclusionary nature of KRE 404(b) by reversing more cases.

Additionally, the Appellee interprets 'a change in the law' too narrowly. A change in the law does not have to occur in a case that declares a statute unconstitutional, rewrites a rule of procedure or evidence, or overturns a century of precedent. While sometimes this happens in one landmark decision, often it occurs in a series of opinions rendered over a number of years.[13] Such is the nature of our American common law

[13] *Crawford v. Washington*, 541 U.S. 36 (2004), provides a useful contrast. *Crawford* did not alter the Court's interpretation of the Sixth Amendment. Nor did it rewrite the definition of hearsay. *Crawford* did shift the focus from the subjective inquiry into trustworthiness and reliability of *Ohio v. Roberts*, 448

tradition. Thus, the law of the case doctrine does not prevent this Court from deciding Appellant's argument that "there has been such a change in the law as it's developed since 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."[14] A new trial is warranted.

4. Comely identification issue

The Commonwealth asks the Court to apply the wrong appellate standard to this issue. *See* Appellee's Brief at 20. This is an unpreserved capital direct appeal error, and the *Sanders* standard applies. No reason or justification appears in this record for not raising this issue at trial, and as argued in the Brief for Appellant, St. Clair was prejudiced. "[I]n a capital murder trial, all evidence introduced in the guilt phase may be considered by the jury during the sentencing phase." *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998). Moreover, guilt phase evidence may have a significant effect on the jurors' choice of sentence. *Strickler v. Greene*, 527 U.S. 263, 305 (1999) (Justice Souter, dissenting). Both the 1998 jury and this third sentencing jury were allowed to base a death sentence on the faulty identification by Comely. St. Clair was prejudiced.

The "law of the case" doctrine does not bar raising this issue because there has never been an appellate ruling on it. The issue may be raised now because this case is still pending on direct appeal and until all issues are decided, including all sentencing issues, no part of the case is final. *Jackson v. Commonwealth*, 319 S.W.3d 343 (Ky. 2010);

U.S.56 (1980), to an objective determination of the testimonial nature of the statement. *Crawford*, 541 U.S. at 60-69. While the Court changed the rationale for its analysis, it noted that many of the prior rulings—including *Roberts*—would not have been decided differently. *Id.* at 58, 60. Whereas *Crawford* changed the analysis but not did not overrule all prior results, this Court in its recent prior bad acts cases has used the same analytical framework but applied it in such a way as to reverse cases to clarify the exclusionary nature of the rule. While different types of changes, they are both valid changes in the law.

[14] CD3 Hearing, 10/17/11, 9:45:40-9:46:15.

Sanders v. Commonwealth, 801 S.W.2d 665, 668 at fn. 1, (Ky. 1990) (pointing out that issues become collateral and suitable for post-conviction attack only after a judgment has become final); Ky. Const. § 110(2)(b); KRS 532.030, 532.040; RCr 11.02; see also *U.S. v. Goodwyn,* 596 F.3d 233, 235 (4th Cir.2010) (a court's imposition of a term of imprisonment constitutes a final judgment).

In *Brown v. Commonwealth*, 313 S.W.3d 577, 611 (Ky. 2010), the defendant did not challenge DNA evidence at his first trial, was convicted, appealed and remanded for a new trial. At retrial, he challenged one small DNA issue. Then, on appeal following conviction at retrial, he challenged DNA a number of ways. This Court reached the merits of his DNA argument under RCr 10.26 after rejecting the Commonwealth's argument regarding 'law of the case and waiver: "the Commonwealth has failed to show that at Brown's first trial the trial court ruled upon the questions Brown now raises concerning the propriety of the Commonwealth's DNA evidence, and thus the waiver rule does not restrain our review." *Brown v. Commonwealth*, 313 S.W.3d at 611. The Comely identification issue has not been raised or ruled on until this appeal. *Brown* supports reviewing the merits of the issue.

Counsel for St. Clair could be subject to a claim of appellate ineffectiveness if they did *not* raise the Comely identification issue. *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010).

5. *St. Clair's waiver of voir dire* procedure was required.

Appellee concedes St. Clair did not personally agree to the Jefferson County method of *voir dire*. Appellee's citation of the unreported case of *Benton v. Commonwealth*, 2011-SC-000411-MR, 2013 WL 1188006 (Ky. Mar. 21, 2013) is

irrelevant because *Benton* is not a death case. Unpreserved error in *Benton* was subject to palpable error review, which is completely different from the *Sanders* standard. The court asked St. Clair's prospective jurors if they felt like sardines.[15] The court acknowledged juror responses would "go under the radar" and unqualified jurors would "get selected."[16] The court had to tell the jury, "Keep your voices loud…."[17] The court admitted the Jefferson County method gave the Commonwealth an advantage, that their table was "closer…they will be able to hear your answers better than the defense."[18] **This record contains no reasonable justification** why defense counsel chose a *voir dire* method that made it more difficult to see and hear prospective jurors in general and gave the prosecution advantages in that regard. It is by no means clear that the Jefferson County method benefitted anyone by shortening the *voir dire* process. But even if it did, making *voir dire* shorter to please the court and the lawyers is not a justification under *Sanders*. To satisfy *Sanders* there must be an explanation or justification that demonstrates some advantage **to the defendant**.

The prejudice prong of *Sanders* is satisfied because no prejudice need be shown when there has been a substantial deviation in the jury selection procedure. *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky. 1980) (no need to show prejudice caused by substantial deviation in jury selection procedure). This was a substantial deviation and it is impossible to determine what effect the Jefferson County voir dire method had in terms of the final jury that was selected.[19] But the structure of voir dire is undeniably a part of

---

[15] CD3 Voir Dire, 10/21/11, 1:30:14 and 1:39:36 – 1:40:20.
[16] CD3 Voir Dire, 10/21/11, 1:41:18.
[17] CD3 Voir Dire, 10/21/11, 1:41:54.
[18] CD3 Voir Dire, 10/21/11, 1:42:20.
[19] *Id.*

the "framework within which the trial proceeds."[20] *See Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (J. Cooper, dissenting), *overruled on other grounds by Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). This structural error defies analysis by 'harmless-error' standards" because it affects the "framework within which the trial proceeds," and is not "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991); *see also Neder v. United States,* 527 U.S. 1, 7-9 (1999). 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).

6. Jurors 15, 16, and 448.

This Court noted that "when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013). Unfortunately, when trial courts fail to do strike the doubtful juror, they "put at risk not only the resources of the Court of Justice, but the fundamentally fair trial they are honor-bound to provide." *Id.* In other words, "the questionable juror should be excused." *Id.*

Juror #15 stated she would have trouble giving 20-50 years and further indicated what she believed about mitigation – laughing as she stated, she "could probably consider it, but a lot of people have rough lives and not murdered people."[21] Similarly, jurors #16 and #448 believed in an "eye for an eye" and believed that 20 years was not an appropriate punishment for an intentional murder.[22]

The problematic jurors' initial answers were more telling than their rehabilitated

---

[20] *Id.*
[21] CD3 Supp., 10/18/11, 13:41:53.
[22] CD3 Supp., 10/18/11, 13:51:05; CD3 Voir Dire., 10/20/11, 12:20:45.

answers. Their initial answers made clear that they could not conform their views to the law. They should have been struck for cause – "there is no shortage of citizens in the Commonwealth of Kentucky willing to serve capably and honorably in the most difficult and demanding of trials." *Ordway*, 391 S.W.3d at 780. As this was the second re-sentencing, with much time and money already spent on "re-trying a difficult case," there was no need for the judge being "too diffident to excuse jurors who were credibly challenged." *Id.*, ("where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused.").

7. *Batson* violation.

St. Clair's *Batson* challenge to the exclusion of the juror who could not afford to serve on the jury is at least half-based on the fact that Juror #667 could not afford to live on Kentucky's inadequate juror pay. St. Clair objected to inadequate juror pay and his *Batson* objection is at least half-preserved. After a hearing and ruling under *Faretta v. California*, 422 U.S. 806 (1975), St. Clair was *pro se* co-counsel.[23] He had authority to file motions and objections, and as a *pro se* litigant he is held to a lesser standard. *Cruz v. Beto*, 405 U.S. 319 (1972) and *Haines v. Kerner*, 404 U.S. 519 (1972); *Million v. Raymer*, 139 S.W.3d 914, 920 (Ky. 2004). Under a *pro se* standard, St. Clair's *Batson* objection on behalf of Juror #667, should be considered completely preserved. Regardless, it must be considered as an unpreserved error under *Sanders*.

Under *Sanders* there is no justification or explanation for trial counsel's failure to object to exclusion of the only juror who shared the same socio-economic status and background as St. Clair. Juror #667 stood a better chance of empathizing with St. Clair than the other jurors. Had Juror #667 served and found St. Clair's socio-economic

[23] CD hearing before Judge Conliffe, 1/19/11, 9:56:43 - 10:09:26 et seq. Ruling at 10:11:58.

background to be mitigating, his single vote against death could have precluded the death penalty. *McKoy v. North Carolina*, 494 U.S. 433 (U.S.N.C. 1990) (holding that mitigation does not need to be found unanimously).

Appellee correctly points out it would not have violated the 13th Amendment to force Juror #667 to serve on St. Clair's jury. But the erroneous exclusion of Juror #667 at a time when he was otherwise fully qualified to serve as a juror nonetheless violated Appellant's rights under the 6th and 14th Amendments and violated Juror #667's right to equal protection. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 618-619 (1991) (exclusion violated equal protection rights of the challenged jurors). A new sentencing trial is required.

8. Jurors and Minimum Wage.

Appellee correctly notes that paying jurors less than minimum wage does not make them slaves. *United States v. Kozminski*, 487 U.S. 931 (1988); *Hurtado v. United States*, 410 U.S. 578,.589 at fn. 11, (1973). But St. Clair is not trying to free the jurors or enforce their rights. The only issue here is St. Clair's right to a fair and impartial jury. As to that issue the Commonwealth offers no argument. Moreover, *Kozminski* does not touch the question whether jurors have any statutory rights under federal or Kentucky minimum wage laws, and they may have statutory rights. What is undeniable is that St. Clair's case was decided by 12 people who were subjected to the hardship of working for nine days with extremely inadequate compensation. Crucially, *Kozminski* does not touch the question presented, whether –in the reality of today's economic world—it violates a criminal defendant's Due Process rights and 6th Amendment right to a fair trial to force him to face a jury that must sit and consider his case for $12.50 a day for nine days.

9. Introduction of victim impact testimony from Tim Keeling's spouse violated the 14th Amendment, KRS 532.055(2)(a)(7), and was irrelevant.

Appellant asserts his *pro se* pleading to prohibit the jury from learning of Tim Keeling's death preserved this issue.[24] "*Pro se* pleadings are not held to the same standard as those prepared by an attorney." *Jackson v. Commonwealth*, 319 S.W.3d 347, 350 (Ky. 2010) (citing *Case v. Commonwealth,* 467 S.W.2d 367, 368 (Ky. 1971) ("Frequently rules are construed liberally in his favor.")). If Appellant objected to the jury learning of Tim Keeling's death, it stands to reason that this objection included the victim impact evidence challenged in this issue. Even if this Court disagrees, Appellant respectfully requests this Court review the substance of the issue.

Appellee attempts to justify the introduction of Lisa Hill's victim impact testimony by classifying it as a standard re-presentation of evidence from the prior trial, but the Appellee's reliance on *Jacobsen v. Commonwealth* is misplaced. 376 S.W.3d 600 (Ky. 2012). *See* Appellee's Brief at 37-38. In *Jacobsen,* this Court authorized "a meaningful idea of the evidence both sides presented during the guilt phase and the arguments they made" to be presented to a jury at a sentencing retrial following an appellate reversal. *Id.* at 612. Lisa Hill did not testify at the last proceeding.[25] Because she did not testify at the prior sentencing, *Jacobsen* does not support its introduction and does not refute Appellant's argument.

KRS 532.055(2)(a)(7) did not authorize introduction of Lisa Keeling's testimony. While the Eighth Amendment does not categorically bar victim impact evidence, such evidence must be relevant. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)("A State may legitimately conclude that evidence about the victim and about the impact of the murder

---

[24] Appellant's Brief at 50-55(Issue 9); TR3-IV, 541-542.

[25] CD3 Pre-trial hearing: 10/17/11; 9:50:00.

on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.") Lisa Hill's testimony was not relevant victim impact evidence because she was not the spouse of Frank Brady—the murder victim in this case.

Admission of evidence irrelevant to a capital sentencing proceeding can constitute constitutional error. *Dawson v. Delaware*, 503 U.S. 159, 165 (1992). A stipulation that a defendant belonged to the white-supremacist gang Aryan Brotherhood possessed no relevance to the sentencing proceedings or to proving any aggravating circumstance and violated the Constitution. *Dawson*, 503 U.S. at 165-167. On remand, the Delaware Supreme Court held the prosecution failed to prove admission of this stipulation was harmless and reversed the case for a new capital sentencing hearing. *Dawson v. State*, 608 A.2d 1201, 1206 (Del. 1992). Appellant is entitled to the same relief.

Lisa Hill's testimony was not relevant because neither she nor Tim Keeling were citizens of this Commonwealth nor did that crime occur here. This Court has "long held as a cornerstone of our jurisprudence that the prosecution 'represents all of the people of the Commonwealth.'" *Gray v. Commonwealth*, 203 S.W.3d 679, 690 (Ky. 2006) (quoting, *Goff v. Commonwealth,* 241 Ky. 428, 44 S.W.2d 306, 308 (1931)). Tim Keeling was kidnapped in Colorado and killed in New Mexico. Neither crime occurred in Kentucky. Appellant has not been charged in Kentucky for any crime related to Tim Keeling; nor had Appellant been charged, much less convicted, in New Mexico for the murder of Tim Keeling when this resentencing trial occurred in October 2011. Nothing in the voluminous record suggests that Tim Keeling or his widow ever lived in Kentucky.

Lisa Hill's testimony was not relevant victim impact evidence. *Payne*, 501 U.S. 808. Therefore, its introduction violated the Due Process Clause of the 14th Amendment.

Reversal for a new capital sentencing trial is required to remedy this constitutional and statutory error.

10. Prior conviction evidence violated *Mullikan* and due process.

The Commonwealth claims the evidence was properly admitted because: 1) it was proper guilt phase evidence; 2) it was admissible as 404(b) evidence; and 3) it is admissible as "law of the case." *See* Appellee's Brief at 39-40. To be clear, evidence regarding Appellant's prior convictions elicited from the Bullitt Circuit Clerk was not proper guilt phase evidence admissible under *Jacobsen v. Commonwealth*, 376 S.W.3d 600 (Ky. 2012). *See* Appellee's Brief at 39. This was penalty phase evidence.

Further, this Court has not previously held that the killings of Ed Large, Mary Smith, Ronnie St. Clair, and William Kelsey, Jr. "was admissible as KRE 404(b) evidence during the guilt phase of the trial." *See* Appellee's Brief at 40. The *St. Clair I* Court never held that Appellant's prior Oklahoma murder convictions were proper 404(b) evidence. Indeed, the Court held the trial court properly admitted 404(b) evidence of Appellant's prior bad acts in Oklahoma, among other things, his jail escape, burglary, and vehicle theft. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-36 (Ky. 2004) (*St. Clair I*). Further, this Court only previously permitted the introduction of, among other things, the victims' names and the fact that the victim died." *St. Clair I*, 140 S.W.3d at 561. Accordingly, the prior conviction evidence was not admissible under KRE 404(b) or "the law of the case" doctrine.

The only conviction Appellant received in Bullitt County was for the murder of Frank Brady. The aggravator that enhanced Appellant's sentence to death was the double murder of William Henry Kelsey, Jr. and Ronnie St. Clair. TR3-IV, 591-593. The

Commonwealth told the jury the details of how Appellant shot Kelsey, Ronnie St. Clair, Ed Large, and Mary Smith each in the head because they were witnesses, which tied neatly with the Commonwealth's theory on how and why he shot and killed Frank Brady. To say "there is not a reasonable likely (sic) the outcome of the re-sentencing would have been different" (Appellee's Brief at 40) is based on improper speculation. *Blane v. Commonwealth*, 364 S.W.3d 140, 153 (Ky. 2012) ("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.").

Even if this Court holds that evidence of Tim Keeling's kidnapping and murder and the impact it had on his wife were properly admitted, under KRE 404(b) and *Jacobson* (Appellee's Brief at 41), the Commonwealth still exceeded the rule and law by letting the Commonwealth discuss Appellant's dismissed drug trafficking charges.[26] This constitutes palpable error. *Blane v. Commonwealth*, 364 S.W.3d 140, 151-53 (Ky. 2012).

11. Asking the jurors to disregard all penalties except death constituted prosecutorial misconduct.

In its zeal to obtain a death sentence the Commonwealth crossed the line between zealous advocacy and misconduct many times. But the single most egregious act of misconduct was the Commonwealth's emotional entreaty during closing argument not to consider any penalty but death. This act of misconduct standing alone warrants a new sentencing trial. The prosecutor **did not** merely ask the jury to "prefer" the death penalty. The prosecutor in closing told the jury that anything but the death penalty would be

[26] CD3 Trial: 10/27/11, 11:38: 13; 11:28:09; 11:29:30; 11:31:40; 11:32:43; 11:33:03; 11:35:48; 11:37:02; 11:40:10.

"nothing." He expressly, specifically told the jury "not to consider anything but death."[27] The prosecutor told the jury that "the rest [of the possible penalties] are meaningless."

With these arguments the prosecutor effectively tossed the jury instructions out the window along with any message the jury might have received during *voir dire* regarding the importance of considering mitigation and the entire range of penalties. This was a flagrant violation of *Lockett v. Ohio*, 438 U.S.586 (1978). See also *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110-11 (6th Cir. 1990) (en banc). This was not the prosecutor's only act of misconduct.[28] But even standing alone, this error mandates a new sentencing trial.

A great deal of mitigating evidence was presented in the third sentencing trial. In addition to evidence that Reese was the sole triggerman, there was evidence of St. Clair's impoverished upbringing and evidence that --despite everything he had done--he was still a person who inspired his ex-wife, his family, his friends, and even his ex-lawyer, a judge, to stand by him, to bring him things he needed on the run, to hide and shelter him from the police and to come to court and testify for him. The Commonwealth's closing **misled** the jury regarding their responsibility to consider this mitigation, and **misleading** a jury mandates a new sentencing trial. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985) the prosecutor argued in closing that the jury's death determination was not final, misleading them in a way that merely **diminished** their sense of responsibility for the sentencing decision. The United States Supreme Court reversed in *Caldwell* because the prosecutor's argument affirmatively **misled** the jury regarding the role of the appellate court. Here the prosecutor's argument misled the jury as to their own role, which was to

[27] CD3 Trial, 10/28/11, 9:07:12 – 9:10:14.
[28] *See* Appellant's Brief, Issue # 13, pages 70-75.

consider all potential punishments in light of all mitigating evidence.

In *Hitchcock v. Dugger,* 481 U.S. 393 (1987), the U. S. Supreme Court held that instructing the jury to consider only certain mitigating evidence was unconstitutional:

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of [the constitution].

Hitchcock v. Dugger, 481 U.S. at 398-99. (internal citations omitted).

St. Clair's jury was instructed to consider whatever mitigating evidence it believed to be true.[29] But when the prosecutor told them not to consider any penalty but death, he effectively told them not to consider any mitigating evidence. The jury must have been confused. Regardless what the instructions said, the Commonwealth **gave the jury permission** to disregard those instructions.

This argument cannot be dismissed by supposing that the jury ignored the Commonwealth's closing argument and strictly followed the instructions. Kentucky's bare bones approach to instructions authorizes the attorneys to explain what the instructions mean and what they do not mean:

> The parties agree and there is no doubt that in Kentucky we observe a "bare bones" approach to jury instructions. To provide the detail which would otherwise be missing, we have held that "[t]his skeleton may then be fleshed out by counsel on closing argument." [citations omitted] Descriptive of the approach we take to instructions and argument is a passage from *Collins v. Galbraith,* Ky., 494 S.W.2d 527 (1973), as follows:
>
> ... Contrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the judge's function to the bare essentials and let

[29] Jury Instructions, TR3-IV, 553, See Brief For Appellant at Tab 7.

> counsel see to it that the jury clearly understands what the instructions mean and what they do not mean. *Id.* at 531.

Young v. J.B. Hunt Transp., Inc., 781 S.W.2d 503, 506-07 (Ky. 1989); *see also King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000) (*also citing Collins v. Galbraith*). St. Clair's jury was **not admonished** to ignore the prosecutor's demand to disregard every penalty except death. By interfering with this jury's ability to consider all penalties and give effect to all mitigating evidence, the prosecutor's closing violated the constitutional guarantee of a fair and impartial jury. *Penry v. Lynaugh*, 492 U.S. 302 (1989) *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) ("...the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." (citations omitted)); *Morgan v. Illinois,* 504 U.S. 719, 739 (1992).

In reversing and remanding for a new sentencing trial, the U. S. Supreme Court made it crystal clear in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), that telling the jurors to put mitigation out of their minds to focus solely on some other aspect of the case is reversible error:

> [Abdul-Kabir's] prosecution is illustrative: The State made jurors "promise" they would look only at the questions posed by the special issues, which, according to the prosecutor, required a juror to "put ... out of [his] mind" [Abdul-Kabir's] mitigating evidence and "just go by the facts." *Supra,* at 1662. Arguments like these are at odds with the Court's understanding in *Johnson* that juries could and would reach mitigating evidence proffered by a defendant. Nothing in *Johnson* forecloses relief in these circumstances. See 509 U.S., at 369, 113 S.Ct. 2658 ("*Penry* remains the law and must be given a fair reading").

Abdul-Kabir, 550 U.S. at 261. Similarly, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) a prosecutor's argument in closing that the jury's death determination was "not final" was

misleading in a way that unconstitutionally diminished the jury's sense of responsibility for sentencing. The U.S. Supreme Court reversed in *Caldwell* because the jury was affirmatively misled regarding the role of the appellate court. Here, as in *Hitchcock* and *Abdul-Kabir*, the jury was affirmatively misled as to its own role, which was to give effect to all mitigating evidence at least by *considering* the entire range of penalties. St. Clair's jury was instructed "you shall consider such mitigating or extenuating facts and circumstances as...you believe to be true." The jury was **never** told how to choose between the court's instructions and the Commonwealth's contrary directive. St. Clair was *denied* instructions telling the jury they were not required to find mitigation unanimously and that a sole juror who believed there was mitigation could veto the death penalty. The prosecutor's closing misled the jury as to their role, exacerbated the denial of any clarifying instruction on mitigation, and violated Appellant's 6th, 8th, and 14th Amendment rights. Reversal is required.

12. Jury Instruction Issues

St. Clair's jury instruction issues are at least "partially preserved" by his tender of defense jury instructions. *Eversole v. Commonwealth*, 550 S.W.2d 513 (Ky. 1977); RCr 9.54(2) requires the tendering of an instruction in a manner that presents the party's position "fairly and adequately" to the trial judge. *Pollini v. Commonwealth*, 172 S.W.3d 418, 428 (Ky. 2005). Insofar as St. Clair's tendered instructions fail to present his positions on appeal fairly and adequately, this Court should apply the standard in *Sanders*.

13. Retroactive application of overruling *Thompson* in order to use St. Clair's prior convictions as aggravators.

Responding to what Appellee might have argued regarding Supplemental Issue #32,[30] Issue #32 is not subject to law-of-the-case. The dissent in *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004) (*St. Clair I*) is not part of the opinion and does not render this otherwise unraised, undecided issue to law-of-the-case status. *See also Brown v. Commonwealth*, 313 S.W.3d 577, 611 (Ky. 2010) (rejecting similar law-of-the-case and waiver arguments). Treating a bare jury determination as a "conviction" in death cases is contrary to interpretations of the word "conviction" in truth-in-sentencing and prior felony offender contexts. Overruling *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993), rendered Kentucky's law regarding "convictions" internally inconsistent. *Thompson* should be reinstated. At a minimum a new sentencing trial is required for Appellant because the overruling of *Thompson* should not have been applied to him retroactively in *St. Clair I*.

CONCLUSION

Appellant Michael Dale St. Clair's conviction should be vacated and his death sentence reversed. Both a new guilt phase and a new sentencing phase are required.

Respectfully submitted,

Susan J. Balliet | Robert C. Yang | Samuel N. Potter

August 26, 2013

[30] Appellee appears to have overlooked Supplemental Issue #32.

APPENDIX

Tab Number	Item Description	Record Location
1	Testimony Of Mr. Peel & Mr. Crum's From 1998 Trial	TE VIII Pgs 2055-2118
2	*United States v. Sebbern,* 10 CR 87 SLT, 2012 WL 5989813 (E.D.N.Y. Nov. 30, 2012)	
3	FBI Letter of 2009	