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**SUPREME COURT OF KENTUCKY**
**FILE NO. 2005-SC-828-MR**

MICHAEL ST. CLAIR — APPELLANT

**v.**

**APPEAL FROM BULLITT CIRCUIT COURT**
**HON. THOMAS L. WALLER, JUDGE**
**INDICTMENT NO. 92-CR-00010-2**

COMMONWEALTH OF KENTUCKY — APPELLEE

# BRIEF FOR APPELLANT

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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. Thomas L. Waller, Bullitt Circuit Judge, PO Box 97, Shepherdsville, KY 40165; Hon David A. Smith and Hon. Michael A. Wright, Commonwealth Attorneys, 1024 Capital Center Dr., Frankfort, KY 40601;Hon. Dana Todd, Commonwealth Attorney, 315 W. Main St., Frankfort, KY 40601; Hon. Steve Mirkin, Trial Counsel, 202 N. Mulberry St., Elizabethtown, KY 42701; Hon. James Gibson, Jr., Trial Counsel, DPA, PO Box 6570, 650 N. Buckman St., Shepherdsville, KY 40165; and Hon. Greg Stumbo, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on October 15, 2007. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

Shannon Dupree

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## Introduction

Michael St. Clair was previously tried, convicted and sentenced to death for the murder of Frances Brady by a Bullitt Circuit Court jury. This Court vacated his death sentence and remanded the matter back to the Bullitt Circuit Court for a re-sentencing. The re-sentencing, fraught with prejudicial error, ended in a death sentence as well. He now appeals that sentence as a matter of right.

## Statement Concerning Oral Argument

Michael St. Clair requests oral argument based on the severity of the sanctions imposed and the complexity of the factual and legal issues involved. Oral argument will assist this Court in reaching a just decision and is mandated by KRS 532.075(4).

## Preface

Unpreserved errors are reviewable where the death penalty has been imposed. KRS 532.075(2); Rogers v. Commonwealth, 992 S.W. 2d 183, 187 (Ky.1999); Perdue v. Commonwealth, 916 S.W. 2d 148, 153-154 (Ky.1995). "The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the Commonwealth is permitted to visit upon wrongdoers." Rogers, supra (citing Cosby v. Commonwealth, 776 S.W. 2d 367 (Ky.1989), citing Beck v. Alabama, 447 U.S. 625 (1980)). Thus, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process. Id. Every allegation of error must be reviewed in this context. Campbell v. Commonwealth, 564 S.W.2d 258, 531 (Ky.1979), allows this Court to exercise its supervisory function and review unpreserved errors. KRE 103(e) allows this Court to consider "insufficiently raised or preserved" errors and to grant appropriate relief "upon a determination that manifest injustice has resulted from the error." In this

case, there is not reasonable justification or explanation for trial counsels' failure to object to any of the unpreserved errors, e.g., counsels' failure could in no way have been a legitimate trial tactic. These unpreserved errors, along with all preserved errors, were prejudicial, i.e., without the error the jury may not have sentenced Michael St. Clair to death. Perdue, supra. In accordance with CR 76.12(4)(c)(iv), counsel have noted at the beginning of each issue whether it is preserved. To avoid repetition, counsel will not refer to the capital case contemporaneous objection rule, KRE 103(e), RCr 10.26 and Campbell, supra where the issue is unpreserved.

## Citations To The Record

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

TR - Transcript of Record from retrial

TE - Transcript of Evidence from retrial

TH - Transcript of Hearings from retrial

OTR - Transcript of Record from first trial

OTE - Transcript of Evidence from first trial

OTH - Transcript of Hearings from first trial

EX - exhibit

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## Statement Of The Case

Michael St. Clair was one of eight children raised in an abusive, poverty-stricken home by alcoholic parents. TE 16 179. The St. Clair family had a history of mental illness and Michael was reared in a chaotic and volatile environment. Michael's uneducated mother would beat him with clothes hangers. Michael had congenital brain damage that caused him to have a seizure disorder. TE 16 167. The seizures occurred in his frontal temporal lobe—the part of the brain that controls reasoning, impulse control and logical thought. Id 170. The seizure disorder caused St. Clair to have a personality disorder, including mood instability and increased aggression. Id. 171. Michael had a borderline I.Q. of 77 and functioned between a 3rd and 4th grade level. Id. He was in special education classes before he dropped out of school. Id. 173-174. A psychologist testified Michael's seizure disorder could be treated with anti-seizure medication, and antipsychotic medication would help his mood disorder and impulse control. The psychologist stated that the risk of violence diminishes appreciably at the age of 40. TE 16 185 At the time of the penalty phase trial Michael was 48.

St. Clair was convicted by a Bullitt County jury for the murder of Frank Brady and a sentence of death was imposed by the Bullitt Circuit Court in 1999. St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004); TR I, 21-30. This Court reversed that sentence in an Opinion rendered in 2004 because "the trial court's instructions erroneously failed to permit the jury to consider a sentence of life without possibility of probation or parole ("LWOP")." Id. at 524.

Prior to trial, the defense made numerous motions that were denied by the court including a motion to recuse the trial court because it had already expressed an opinion

on the merits of the proceeding, TR 1 135, a motion to exclude the death penalty because the aggravating circumstances were unconstitutionally vague, TR 2 155, a motion to exclude 404(b) evidence, TR 2 196, a motion to exclude jurors who were aware of the previous outcome from St. Clair's previous trial, TR 2 189, as well as a motion to exclude inadmissible victim impact evidence. TR 3 304.

Trial commenced on April 16th, 2005. Over objection, the court limited voir dire as requested by the Commonwealth. TE 2 3. Jurors were excluded for cause who should not have been, and at least 16 challenges for cause were improperly denied. The court refused to exclude 2 jurors who knew about St. Clair's death sentence. See Arg. 10 and 11 for preservation cites.

As this was a penalty phase trial, the trial court ordered the parties to meet and decide the manner of the presentation of evidence of each witness—i.e., live testimony, witness summary or a combination of the two. TR 2 172. The parties met several times and discussed the manner of presentation for each witness. At no time during any of these meetings did the prosecution tell the defense it intended to introduce St. Clair's testimony in full from a previous trial. Id. The defense detrimentally relied on the Commonwealth's disclosure of witnesses and was thereby misled to believe that there would be no need to address St. Clair's previous alibi testimony or the incriminating fingerprint and identification evidence. The defense did not learn about the Commonwealth's intent until the close of the third day of evidence. TR 3 430- 436; TE 18 164, 173 – 181; TE 19 2 – 40, 43 - 48, TE 19 49 – TE 20 210.

St. Clair filed at least 14 *pro se* motions, most of which were argued substantively in court. At no time did the trial court conduct a hearing to determine if St. Clair's limited waiver of representation was knowingly, voluntarily or intelligently made.

The prosecution sought to keep the jury focused on the victim from the very beginning of the trial. The first witness was the victim's daughter who cried when she told the jury how her dad was a gifted fiddler, a wonderful grandfather that loved babies but never got to see his last grandchild be born, a man whose favorite color was purple and who picked flowers for his children. TE 13 91-97.

Even though this trial was just a penalty phase retrial, and even though a certain amount of background information about the crimes was admissible, the Commonwealth and the court refused to limit the evidence to just background information and the Commonwealth presented abundant irrelevant guilt phase evidence with added inflammatory testimony that it had not presented at the prior trials. TE 14 218, TE 15 36.

Throughout the trial the Commonwealth asked improper questions, TE 16 271, TE 1 137, blatantly led witnesses, TE 21 69, 92; TE 22 168; TE 23 16, 29, engaged in improper argument, TE 13 48, TE 12 15, TE 24 10, 13, 18, 25, 35, 36 and bolstered its witnesses TE 13 121, TE 17 51. The prosecution introduced irrelevant, prejudicial evidence about St. Clair's Oklahoma convictions. See Arg. 28 for preservation cites.

The trial court improperly instructed the jury on the aggravator despite explicit directions from this Court that on 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, supra, 571. The trial court refused to properly define the aggravator and instead used a paraphrase of the statute that

significantly altered and broadened the aggravator. In addition, the trial court refused to instruct the jury that some of St. Clair's convictions in Oklahoma did not meet the statutory criteria for consideration as an aggravating circumstance. TR 4 457, 466; TE 23 82 – 88. At the time of Brady's death, there had been no trial, no verdict, no final judgment on those convictions.

The jury returned a verdict sentencing Michael St. Clair to death for the murder of Frank Brady. TR 4 474. The trial court followed the jury's recommendation and imposed the death sentence. TH 9/30/05 4. Final Judgment was entered on October 5, 2005 and timely Notice of Appeal was filed on October 17, 2005. TR 4 490.

## Arguments

### 1. No Hearing Re Hybrid Counsel.

This issue does not have to be preserved because Faretta v. California, 422 U.S. 806, 835 (1975), places the duty on the trial court to create a record of a knowing and intelligent waiver of the right to counsel.

In December of 2004, Michael St. Clair filed a *pro se* motion to be designated as lead counsel. TR 1, 118. This motion was very telling about how St. Clair perceived his role at trial. This document was entitled "Appearance of Counsel." TR 1 118. The hand-written attachment to the document stated: I am Lead Counsel [x] or I am Co-Counsel [ ]. TR 1 119. St. Clair had marked the box next to "Lead Counsel." Although St. Clair later withdrew his motion to be designated as lead counsel, no mention was made of his status as co-counsel. TH 1/10/05; TR 1 131.

St. Clair continued to act as co-counsel throughout his resentencing trial. TH 1/10/05; TR 1 131. Defense counsel requested that any *pro se* pleadings filed by St. Clair be forwarded to defense counsel rather than placed on the docket. "If we think it is something that needs to be heard we will re-file it in the proper format and ask for a hearing." TH 1/10/05 5. The trial court even directed in a written order that no further *pro se* motions would be filed or placed on the docket. TR 1 131. Regardless, St. Clair continued to file *pro se* motions, the court continued to docket the *pro se* motions, St. Clair continued to substantively argue many of his *pro se* motions and/or allow defense counsel to argue the motions. After withdrawing his motion to be designated as lead

counsel, St. Clair filed the following *pro se* motions, the majority of which were addressed substantively in court:

Motion for Speedy Trial. TR 1 121; TH 1/10/05 3.
Motion to Recuse Trial Judge TR 3 408; TH 1/10/05 3.
Motion to release defense attorneys TR 3 371; TH 8/10/05 5.
Motion to Continue TR 3 375; TH 8/10/05 40.
Motion to Exclude LWOP sentence. TR 1 116; TR 3 379; TH 8/10/05 49.
Motion for Dismissal of Charges. TR 2 174; TH 8/10/05 98.
Motion for Equal Representation TR 2 218; TH 8/10/05 99.
Motion to be Assigned Table. TR 2 225. TH 8/10/05 99.
Motion to Arrest Commonwealth Attorneys. TR 2 228; TH 8/10/05 98.
Motion to Dismiss Charges. TR 2 232; TH 8/10/05 98.
Motion to Have Trial in City Limits. TR 2 237; TH 8/10/05 98.
Motion to Dismiss Indictment. TR 2, 245; TH 8/10/05 99.
Motion to Bar Mr. Wright from Prosecuting Case. TR 3 412; TE 1 33.

In several of his *pro se* motions, St. Clair made it clear he was taking on the core functions of counsel. In his *pro se* Motion for Dismissal of Charges, St. Clair specifically requested the trial court "to make a ruling on this motion and not try and ask Defense Counsels Mr. Mirkin & Mr. Gibson Jr. to withdraw this motion and these issues." TR 2 174-176.

In his *pro se* Motion for Equal Representation (TR 2 218) St. Clair stated:

> "As this Court and prosecutors and only (2) capital defense attorneys all know, Mr. St. Clair has had to prepare or have prepared many of his own *pro se* motion in this case and a capital case at that. Mr. St. Clair, not [blaming] his only two (2) capital defense attorneys Mr. Mirkin and Mr. Gibson Jr. concerning this self *pro se* representation matter. Because like the prosecutors Smith, Wright, Todd, this kind of Capital Case calls for more atty. help for both sides and even more the defendant who's life at [stake]." TR 2 218- 222.

Likewise, the attorneys and trial court also treated St. Clair as if he were co-counsel. In the *pro se* Motion to Bar Mr. Wright from prosecuting the case, the trial court specifically asked defense counsel "[S]o, Mr. Mirkin and Mr. Gibson, you want to speak

to that Motion or do you want St. Clair to speak to it?" Defense counsel responded, "It's his [Mr. St. Clair's] motion, judge." TE 1 33. As such, St. Clair argued the motion.

The trial court, the Commonwealth and the defense attorneys essentially allowed St. Clair to act as hybrid counsel. As prosecutor Mr. Smith stated at the August 2005 pretrial hearing, "In his Pro Se Motion St. Clair does not make clear whether he's wanting new counsel, whether he wants to proceed pro se, whether he wants hybrid counsel... [I] don't know whether he's going to withdraw today. But if he's going to press this motion then we need to find out what exactly it is he wants other than a complaint in general about his lawyers" TH 8/10/05 11-12. In response, St. Clair stated he did not want to represent himself, that he wanted new attorneys. Id. 14. The trial court overruled his motion. Yet, there can be no doubt that St. Clair continued to perform core functions of counsel. Both the trial court and the defense counsel sent very contradictory messages as to St. Clair's role in his trial. Both explicitly stated there would be no further pro se motions docketed. However both allowed, and even encouraged at one point, St. Clair to argue the pro se motions.

Since both the trial court and the defense attorneys acquiesced in St. Clair's hybrid representation, it was incumbent upon the court to hold a hearing. The court allowed St. Clair to act as hybrid counsel without any inquiry whatsoever into whether his limited waiver of representation was knowingly, intelligently and voluntarily made. St. Clair filed at least 14 *pro se* motions. Before a defendant can proceed *pro se*, the court must ensure that a defendant's waiver of counsel is knowingly and intelligently made. "[T]he trial judge has an affirmative duty to make the accused "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what

he is doing and his choice is made with his eyes open.'" Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004). St. Clair was never warned about the dangers of a limited waiver of counsel. When a defendant makes a request to proceed *pro se* or for hybrid representation, the principles of Faretta v. California, 422 U.S. 806, 807 (1975) apply and mandate that the trial court 1) "hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent;" 2) "warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel;" and 3) "make a finding on the record that the waiver is knowing, intelligent and voluntary." Hill, at 226 (internal citations omitted); Deno v. Commonwealth, 177 S.W.3d 753, 758 (Ky. 2005). The waiver of counsel is ineffective unless all three requirements are met. Matthews v. Commonwealth, 168 S.W.3d 14, 23 (Ky. 2005). Several federal courts have made it absolutely clear a defendant's right to counsel is violated, and therefore must be validly waived, whenever the defendant undertakes any of the "core functions of counsel." *See, e.g.* United States v. Davis, 269 F.3d 514, 519-520 (5th Cir. 2001); United States v. Turnbull, 888 F.2d 636, 638 (9th Cir. 1989).

The failure to conduct an appropriate hearing on this issue is a structural defect in the trial mechanism. Hill, supra; Arizona v. Fulminante, 499 U.S. 279, 310 (1991). No showing of prejudice is necessary. Reversal is required because of this error. §§2, 11 and 17, Ky. Const.; 6th, 8th and 14th Amends., U.S. Const.

**2. St. Clair's Prior Testimony Was Inadmissible Without Notice And Redaction.**

This issue is preserved. TR 3 430- 436; TE 18 164, 173 – 181; TE 19 2 – 40, 43 - 48, TE 19 49 – TE 20 210.

**A. Lack of notice.** This Court in St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) ordered a new penalty phase. As this was a resentencing, the prosecution could introduce such evidence as may be necessary to tell the jury "something about what transpired in the earlier guilt phase if they indeed are not to sentence in a vacuum." Boone v. Commonwealth, 821 S.W.2d 813, 814 (Ky. 1992).

At a pretrial conference regarding Defendant's Statement to the Court Regarding Penalty Retrial Procedures, the trial court directed the parties to meet and attempt to reach agreement on the presentation of evidence at retrial. By written order, the trial court stated, "By agreement of counsel, the parties are given until July 18, 2005 at 10:00 a.m. **to confer with respect to presentation of evidence whether by live testimony or a summary of the evidence, or a combination of the two**. In the event the parties cannot agree, they are to appear on July 18, 2005 at 10:00 a.m." TR 2 172. Counsel for the parties met and negotiated on July 8, 2005 and reached a substantial, although not complete, agreement. Pursuant to said meeting, numerous proposed summaries of prior testimony were prepared by the defense and the prosecution. See TR 2 266-300; TR 3 321-348; 359-367; 381-401; 420-423.

On July 18th, a hearing was held at which only Attorney Todd appeared for the prosecution. On her representation that the prosecution was not fully prepared to address the remaining evidentiary issues, and had not yet prepared many of its proposed summaries, the court continued the matter for hearing on August 10, 2005. TH 07/18/05.

Between July 18th and August 10th, the parties continued to exchange proposed summaries. Additionally, a conference call was conducted on August 3rd in which further discussions were held toward that end. By the time of the hearing on August 10th, the

prosecution represented that it wished to call ten witnesses, and the remaining witnesses from the first trial could be presented by summary. Only one of the proposed witnesses had not testified at the first trial; the defense object to that witness (Lisa Keeling) and the trial court reserved ruling. Other witnesses who had testified at the first trial were excluded by agreement of the parties (Scott Kincade, FBI Agent Peel and Jeff Libby). TH 8/10/05 100-128; TE 18 173-181.

At no time in any of these discussions, or at any hearing before the trial court (until August 24th) did the prosecution make any reference to introducing any of St. Clair's guilt phase testimony. In fact, the prosecution at one point inquired of defense counsel whether *they* intended to present St. Clair's testimony at the retrial, by transcript or summary, and were assured the defense had no such intention. TR 3 430.

The defense relied upon the prosecution's representations as to which witnesses it intended to call and/or present by summary, to its detriment. The defense prepared its case based upon the prosecution's representations made in apparent good-faith negotiations conducted pursuant to the trial court's order. In sum, the defense was led (misled) to believe that there would be no need to address St. Clair's previous alibi testimony or the incriminating fingerprint and identification evidence. No indication was given to the contrary until the close of the third day of evidence, after the prosecution had presented testimony or summaries of all but two of its other proposed witnesses.

The trial court order specifically stated that the parties were "to confer with respect to presentation of evidence whether by live testimony or a summary of the evidence, or a combination of the two." This gave the parties three options for each witness (live, summary, combination). If the parties could not agree, then the decision

would be made by the trial court. There is no valid reason or excuse why the prosecution would not have informed the defense that it intended to use St. Clair's guilt phase testimony other than to sandbag the defense. The trial court *ordered* the parties to meet and discuss the presentation of evidence for the witnesses.

Had the defense been advised the prosecution intended to introduce St. Clair's guilt phase testimony, it would not have agreed to summaries of a number of witnesses, and it would have cross-examined several witnesses differently and more extensively. Additionally, the defense would have conducted individual voir dire differently.

> The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.
>
> The standards of the market place do not and should not govern the relationship between the government and a citizen. People v. Reagan, 395 Mich. 306, 235 N.W.2d 581, 585 (1975). "Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example." Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944, 960 (1928) (Brandeis, J., dissenting). If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy. Workman v. Commonwealth 580 S.W.2d 206, 207 (Ky., 1979).

While Workman has been overruled on other grounds, its central principle remains valid. If an "offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable." Matheny v. Commonwealth, 37 S.W.3d 756, 758 (Ky. 2001). That the defense herein relied on the prosecution's representations regarding its proposed evidence is undeniable. It is just as apparent that such reliance was to St. Clair's detriment when the prosecution was permitted to change its course and enter St. Clair's prior testimony.

**B. Refusal to redact.** When the prosecution announced it intended to read St. Clair's testimony from the previous trial to the re-sentencing jury,[1] the defense objected. TE 18 164. The court made it clear a defendant was not required to testify in the penalty phase and reading his testimony would, in effect, be compelling his testimony. Id. The court then thought the testimony from the previous trial might be admissible and case law should be reviewed. TE 18 173 – 181. The following Monday, the prosecution relied on Sherley v. Commonwealth, 889 S.W.2d 794, 798 (Ky. 1994) which holds a defendant's guilt phase testimony from an original trial can be read at the guilt phase of the retrial. TE 19 3 – 40, 43 - 48. The prosecutor also argued "under a unitary system of justice...anything and everything that is heard during the guilt phase is supposed to be considered by the sentencing jury." Id. The prosecutor also argued it was not appropriate or necessary to redact anything from the previous testimony except sustained objections and bench conferences. Id.

The defense distinguished Sherley by pointing out it involved a retrial of the guilt phase of a trial and not just a resentencing. Id. Counsel pointed out the previous testimony primarily dealt with St. Clair's alibi defense and explanations of physical evidence such as fingerprints, neither of which were in issue at resentencing. Id. Counsel argued relevance was required and had not been shown. Id. The defense would have proceeded very differently in resentencing if it had known the prosecutor was going to

[1] The first morning following selection of the jury, the court agreed, over defense objection, the prosecution could read the part of St. Clair's previous testimony acknowledging the guilty verdict in one of his Oklahoma cases because in the 13 years since the indictment was returned in this case the prosecutor apparently had not managed to get certified copies of prior convictions. TE 13 21 – 36. This alternative was abandoned when the trial court decided he could take judicial notice of this Court's findings about the prior conviction in its Opinion in the previous appeal. Id.

introduce this previous testimony. Id. The trial court overruled counsel's request to exclude St. Clair's testimony from the previous trial. Id.

With regard to possible redaction of the previous testimony, the prosecutor stated he knew not to read bench conferences and sustained objections as well as the objectionable question or answer. Id. Counsel agreed those things should be excluded but wanted to see the redacted version of the testimony. Id. Counsel further argued the court should also exclude references to Scott Kincaid, Jeff Libby, the testimony of Bylynn St. Clair Van Zandt, the Oklahoma testimony of Vernon Stephens, and the search of T.J. Frost's barn by Unruh. Id. Counsel objected to any backdoor references to witnesses the parties agreed not to present. Id. The prosecutor protested that butchering the transcript would be confusing to the jury. Id. The trial court denied all of counsel's requested redactions. Id. Counsel's request for a mistrial was denied. Id.

After a short break, the prosecution stated it would not read any hearsay from Vernon Stephens. Id. Over defense protest to the absence of a redacted transcript to be read to the jury, the prosecutor said he would know excludable testimony when he saw it and would just skip over it. Id. The testimony of St. Clair's previous testimony was then read to the jury by the prosecutors with largely *ad hoc* redactions. TE 19 49 – TE 20 210. The numerous references to and rebuttal of witnesses and testimony never heard in any form by this jury served no legitimate purpose. It only enabled the prosecutor, after stream-lining all the other evidence heard by the jury, to improperly argue to this jury that St. Clair tried to manipulate and put one over on the first jury by testifying before them and asserting an alibi defense. TE 24 32.

The court's reliance on Sherley, supra, was misplaced. Unlike Sherley, St. Clair's remand was for only a re-sentencing, not a full re-trial. Issues arising at a standard guilt-innocence trial were not before St. Clair's jury. Sherley does not address, much less control, the question of whether a defendant's guilt phase testimony can be read at a re-trial on the limited question of sentencing. There appears to be no case on point.

Furthermore, it is not true or necessary that "a resentencing jury is entitled to hear everything that was introduced during the guilt phase of the trial. Evidence presented by the State during the penalty phase must be relevant to an issue properly being considered during that phase, such as an aggravating circumstance." Farina v. State, 801 So.2d 44, 50 -51 (Fla. 2001); See also Kormondy v. State, 703 So.2d 454, 463 (Fla.1997):

> The jury is charged with formulating a recommendation as to whether Kormondy should live or die. Testimony that Kormondy said he would kill again, when that testimony is not directly related to proving a statutory aggravating circumstance, is outside of the scope of evidence properly presented by the State during the penalty phase. We find that this evidence in this instance constitutes impermissible nonstatutory aggravation. For this evidence to be admissible at the penalty-phase proceeding, it has to be directly related to a specific statutory aggravating factor. Otherwise, our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute.

While St. Clair's testimony very briefly addressed his Oklahoma verdicts, TE 19 53, TE 20 203, the vast majority of the testimony was not remotely relevant to any aggravator. The prosecution managed finally to produce last-minute records from Oklahoma and had no need of St. Clair's testimony about them. Even if needed, the testimony could have been properly limited to that brief portion and excluded the bulk of the testimony that was wholly irrelevant to the issues before the jury. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." KRE 401. "Evidence which is not relevant is not admissible." KRE 402. It is difficult to conjure up any reason why testimony about matters objected to here would be relevant to the limited questions before the jury. Even if the objected to testimony was by some wild stretch of the imagination found to have some limited relevance, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. KRE 403.

The effect of this irrelevant evidence introduced, without proper notice, by the prosecutor was to mislead and confuse the jury, and to coerce a verdict of death. Reversal is required. 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 7, 11, 17 KY Const.

**3. Penalty Phase Instructions Denied Reliable Capital Sentencing.**

This issue is preserved as to § A, B, C, E, and F. TR 4 456, 457, 459, 460, 477 – 479; TE 23 81 – 94, 106 -107.

"[The jury's] sentencing discretion...[must be] guided and channeled..." Proffit 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." St. Clair's penalty phase instructions failed to comply with these constitutional imperatives. His right to a fair trial, due process and reliable sentencing were violated. 6th, 8th, 14th Amends., US Const.; §1, 2, 3, 7, 11, 17, 26, KY Const.

**A. Wording Of Aggravator.** KRS 532.025(2)(a)(1) authorizes death as a sentencing option where the "offense of murder or kidnapping was committed by a

person with a prior record of conviction for a capital offense." St. Clair requested the instructions track the language of the statute when referring to this aggravator. TE 23 81 – 82, 106 – 107; TR 4 459; A 13 - 24. The court refused and used a paraphrase of the statute that significantly altered and broadened the aggravator: "The murder was committed by the Defendant and the Defendant has a prior record of conviction of murder, a capital offense." TR 466; A 3 – 12. The wording and meaning of the statute is plain and clear. If the court used the statutory language, it would have been much less likely the jury considered the non-qualifying prior convictions—or even prior alleged crimes that were never charged[2]-- in finding proof of the aggravator. This failure to properly narrow the evidence in aggravation by accurately articulating the aggravator rendered the resultant death sentence arbitrary and unreliable. Indeed, this Court's directions to the trial court on this matter were crystal clear: "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 v. Commonwealth, 140 S.W.3d 510, 571 (Ky. 2004).

**B. No Limiting Instruction On Non-Qualifying Priors.** The unfair prejudice created by the court's refusal to properly define the aggravator was grossly and unnecessarily compounded by the court's refusal to give the requested limiting instruction: "...the Defendant's convictions in Choctaw County, Oklahoma in 1994 (CRF-90-145) do not meet the statutory criteria for consideration as an aggravating circumstance." TR 4 457, 466; A 13 – 24; TE 23 82 – 88. There had been no trial, no

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[2] The sole question asked by the jury while deliberating sentence was "if the Defendant has been charged with Mr. Keeling's Murder? Because they keep saying it was six people and nobody has ever said if he's actually been charged and convicted." TE 24 66. The court missed another opportunity to clarify that neither prior uncharged acts nor two of the prior convictions meet the criteria of the statutory aggravator. Id. See § B, infra.

verdict, no final judgment on these convictions at the time Brady was killed. Id. This Court, in its opinion reversing St. Clair's death sentence, made it clear these conviction did **not** meet the statutory criteria for the statutory aggravator sought by the prosecutor. Id.; St. Clair, supra. The failure to so advise the jury also resulted in a denial of St. Clair's constitutional right to a unanimous verdict. Hayes v. Commonwealth, 625 S.W.2d 583 (Ky.1981). There is no way to tell that all of the jurors were thinking of the qualifying prior convictions and not the clearly unqualified ones—or even worse, unqualified non-convictions—when they found the aggravator. Because the instructions did not track the statutory language and failed to include a limiting admonition regarding the non-qualifying priors, it is very possible the jury relied on them in finding the aggravating factor. Without a definite standard against which to measure the prosecution proof, there is no way to know whether each juror based his or her finding upon competent evidence. Wells v. Commonwealth, 561 S.W.2d 85, 87 – 88 (1978). In addition to increasing the likelihood of an arbitrary and unreliable verdict, this was also a clear violation of St. Clair's right to a unanimous jury verdict, guaranteed by §7, KY Const., and 14th Amend., US. Const.

**C. Non-Statutory Mitigation.** The court instructed the jury on the one statutory mitigator requested by the defense: "At the time of the capital offense, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is insufficient to constitute a defense to the crime." TR4 467, 456; A 13 - 24. The court

also included the standard mitigator "catch all" instruction. TR 4 467; A 3 - 12. While this court has not held it necessary to instruct on non-statutory mitigators, special circumstances required the requested instruction on brain damage be given in this case. TR 4 456; TE 23 89 – 91. St. Clair's congenital brain defects impacted his ability to control his impulses and to plan and think about consequences. TE 16 171, 188, 221 – 223, 264; TE 21 78 – 80, 82, 84, 87, 96, 106; TE 23 45, 47, 48. This brain defect was not mental illness, nor mental retardation, nor intoxication but it impacted his ability to conform his conduct to the requirements of the law. The jury should have been able to consider it on an equal footing with mental illness, mental retardation and intoxication. Bizarrely, a mitigating instruction was given on mental retardation and intoxication even though the evidence established neither existed, but there was no instruction on brain damage which all experts agreed existed and impacted impulse control and the ability to foresee consequences. Jurors may well have believed the instructions prohibited their consideration of St. Clair's brain damage in this respect. Gregg v. Georgia, 428 U.S. 153, 192, 189 (1976) recognized that simply hearing evidence without proper guidance or direction can result in imposition of a capricious, arbitrary death sentence. The jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense. The Supreme Court consistently has condemned the erection of any barriers, including inadequate instructions, to full consideration of mitigation without regard to the device by which the barrier was created. Mills v. Maryland, 486 U.S. 367, 375 (1988); Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 398-399

(1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986).

**D. Non-Unanimous Mitigation.** The court's instructions required the jury's verdict to be unanimous. TR 4 471 A 3 - 12. Jurors were not instructed they could consider any mitigator they individually believed to be true even if all the other jurors did not find it to be true. Thus, a reasonable juror could have believed the whole jury had to unanimously agree upon a mitigator before it could be weighed against the alleged aggravator in arriving at a sentence. Due to improper instructions, jurors might well have been precluded from considering relevant mitigation. If this situation existed, then a juror could be precluded from giving mitigating evidence any effect whatsoever in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. Mills v. Maryland, 486 U.S. 367, 384 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990); Kordenbrock v. Scroggy, 919 F.2d 1091, 1110-11 (6th Cir. 1990); Gall v. Parker, 231 F3d 265, 322-329 (6th Cir. 2000). Studies of Kentucky capital jurors reveal that 75% of jurors who sat on a capital case believed mitigation had to be found unanimously to be considered. Sandys, The Life or Death Decision of Capital Jurors: Preliminary Findings from Kentucky at 27. See A 25 - 54. Obviously, there is more than a substantial probability that St. Clair's jurors believed they must find mitigation unanimously to consider and give effect to it.

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. Mills at 376. "In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." Id. Any doubt about the meaning of a death penalty instruction has to be resolved in favor of the accused. Id., 378.

**E. Mention Of Probation.** St. Clair requested that when LWOP/25 and LWOP were referred to in the instructions that there be no reference to the possibility of probation since probation was absolutely not a possibility under any circumstances at any point in time in this case. TE 23 92 – 94. The inclusion of "probation" in the instructions mentioning LWOP/25 and LWOP raised false issues for the jury both with respect to the LWOP/25 and LWOP sentences in particular and all the sentences other than death in general. The court prejudicially instructed the jury that two of the sentencing options were "[c]onfinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence" and ""[c]onfinement in the penitentiary for life without benefit of probation or parole. TR 4 468; A 3 - 12. Instructions, which referred to the sentence as life imprisonment without the possibility of being considered for parole [or parole for 25 years], should have been given.

**F. Consequences Of Verdict.** The jury should have been instructed if it sentenced St. Clair to death, he would be killed by lethal injection. Jurors should understand "death means death" and not simply that St. Clair would be removed from the community. Additionally, the requested instruction should have been given to accurately inform jurors about parole. TR 4 460; A 13 - 24. The jury received limited parole eligibility information on only two of the sentences and was never told parole eligibility does not guarantee parole or that a defendant who is not paroled will remain in prison until his death. Such information is routinely provided jurors in even the most minor felony cases. KRS 532.055(2)(a). Why is there "truth-in-sentencing" in all cases except for those where the defendant's life might be forfeited due to the jury's misconception about parole? See Shafer v. South Carolina, 532 U.S. 36, 39 (2001).

**G. Reasonable Doubt.** The court's reasonable doubt instruction stated, "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." TR 4 469; A 3 - 12. This instruction told the jury St. Clair could be sentenced to a lesser punishment **only** if there were a reasonable doubt death was the proper penalty. The instruction invaded the jury's province and created a substantial probability it believed it should impose death unless there was a reasonable doubt death was the appropriate punishment. The jury does not have to find beyond a reasonable doubt that death is either an appropriate or inappropriate penalty. Although a jury must find an aggravator beyond a reasonable doubt in order to consider whether death should be imposed, the question of punishment, even when aggravation is found, rests solely on twelve individual persons, none of whom are required to find that they have a reasonable doubt about death in order to reject it. The jury's death sentence may be the result of this coercive instruction.

**H. Non-Statutory Aggravator Findings.** Nowhere in the instructions was the jury required to make any findings with respect to non-statutory aggravators. For example, the instructions did not require the jury to find the non-statutory aggravators of other crimes[3] and lack of remorse, even though the prosecutor urged that factor specifically as a reason for the jury to impose the death penalty. This Court has held a death sentence can be based on non-statutory aggravation. See Jacobs v. Commonwealth, 870 S.W.2d 412, 419 (Ky. 1994). Because a non-statutory aggravating circumstance can support the imposition of an enhanced sentence, the jury has to be instructed it must find any such aggravator beyond a reasonable doubt. Ring v Arizona, 536 U.S. 584 (2002).

[3] The other crimes reference here does not include prior convictions proffered by the prosecution as evidence of the aggravating factor.

**I. Written Mitigation Findings.** Specification of the jury's findings regarding mitigation is essential to "meaningful appellate review." Proffitt, supra. Our statute 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). Smith v. Commonwealth, 599 S.W.2d 900, 912 (Ky.1980) should be overruled.

**Conclusion.** The instructions were constitutionally defective, denying St. Clair due process, a fair penalty hearing and reliable sentencing. 5th, 6th, 8th, 14th, Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const. A new penalty phase is required.

## 4. Unconstitutionally Vague Aggravator.

Preserved. TR 2 155–158, 172–173; TR 4 477–479; TH 6/15/05 2–7; TE 13 21–36.

KRS 532.025(2)(a)(1) permits a death verdict to be based on a finding the "murder...was committed by a person with a prior record of conviction for a capital offense." Michael St. Clair's jury was instructed on this aggravator, see Args. 3 & 5, and found it to exist. TR 4 466, 474. Because this aggravator is unconstitutionally vague under the US and KY Constitutions, St. Clair's death sentence must be vacated.

"The offense of murder...was committed by a person with a prior record of conviction for a capital offense" is the first, and probably the vaguest, statutory aggravator. What does "prior" mean? A conviction prior to the date of the murder? A conviction after the date of the murder but prior to trial? Does a conviction count so long as it is prior to the moment the jury goes out to deliberate penalty? What constitutes a

"record of conviction"? Could conviction mean a verdict of guilt by a jury or judge prior to final sentencing? What if the conviction is pending appeal or has been reversed or if the defendant was pardoned? What is a "capital offense"? Could it be any offense ever punishable by death? What if the defendant was theoretically, but not actually, subjected to a possible death penalty, e.g. the prosecution elected not to seek death or there was no constitutionally valid death penalty statute in effect at the time? Does it include convictions that were punishable by death at the time of the prior offense or must they also be punishable by death under our present statute?[4]

The statute provides absolutely no guidelines. It impermissibly delegates fundamental decisions to prosecutors, judges and juries for resolution on an *ad hoc,* subjective basis with the attendant dangers of arbitrary and discriminatory application:

> "Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny." Arnold v. State, 224 S.E.2d 386, 391 (Ga. 1976).

In Godfrey v. Georgia, 446 U.S. 420 (1980) the Supreme Court, in finding a different aggravator void for vagueness, stated:

> "...if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of the state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' It must channel the setencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' As was made clear in Gregg, a death penalty 'system could have standards so vague that they would fail adequately to channel the

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[4] Prior to 1975, Kentucky authorized the death penalty for willful murder, homicide in course of criminal syndicalism or sedition, homicide from road obstruction, lynching or mob violence, rape of a child under 12, rape of a female over 12, carnal knowledge of a child under 12, kidnapping, armed robbery or burglary, and armed assault with intent to rob. KRS 435.010, 435.030, 435.060, 435.070, 435.080, 435.090, 435.100, 435.140, 433.140, 433.150. Surely, the legislature did not intend "capital offense" to refer to such a broad spectrum of crimes but that is a possible interpretation.

> sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur.'" Id. at 428 (internal cites omitted).

In Maynard v. Cartwright, 486 U.S. 356, 360 – 363 (1988), the Supreme Court reaffirmed that under the 8th Amend. an aggravator is unconstitutionally vague if it fails to adequately inform the jury as to what it must find to impose death or leaves the jury and appellate courts with unchanneled discretion to make arbitrary and capricious decisions. Additionally, the aggravator in this case is also vague under the 14th Amend. Due Process Clause due to lack of notice since a reasonable person with no prior convictions of capital murder at the time the offense was committed would not know that their conduct would bring them within the ambit of the statute and put them at risk of a death sentence if they later received a capital conviction.

The aggravator in question fails to satisfy the 8th or 14th Amends. See also §1, 2, 3, 11, 17, 26, KY Const. St. Clair urges this Court to hold that KRS 532.025(2)(a)(1) is unconstitutionally vague. Furthermore, the jury and judge's reliance on this unconstitutional aggravator requires St. Clair's death sentence be set aside. This remedy is required because 1) there was no other aggravator found by the jury; 2) the evidence in question was not otherwise properly before the jury; 3) it cannot be said that the improper consideration of 4 prior murder convictions as an aggravating factor had an inconsequential impact on the jury's sentencing decision and 4) in Kentucky the finding of an aggravator plays a significant role in guiding the sentencer's discretion. Johnson v. Mississippi, 486 U.S. 578 (1988).

A testament to the vague, arbitrary nature of this aggravator is the opinion in St. Clair v. Commonwealth, 140 S.W.3d 510, (2004) and the trial court's inability to

properly instruct the jury. In degradation of every rule of statutory construction, 30 years of death penalty jurisprudence, and seven decades of precedent, a majority of this Court engaged in a six-page convoluted effort to produce a definition of the words used in the statute that was rejected for determining persistent felon status but now inexplicably created a "meaningful basis" for imposition of a death sentence that is not "standardless and unchanneled." This Court's guidelines cannot withstand constitutional scrutiny. The trial court was not sufficiently guided to instruct on this aggravator in accordance with the directions of this Court or in a way that would avoid a non-unanimous verdict. See Args 3 & 5. More clarity, less ambiguity and less arbitrariness are required by the Constitution. Reversal of St. Clair's death sentence is required.

**5. Denial of Directed Verdict Of Acquittal On Aggravator.**

This issue is preserved. TR 2 155 – 158, 172 – 173; TR 4 477 – 479; TH 6/15/05 2 – 7; TE 13 21 – 36; TE 21 36 – 37; TE 23 78 – 79.

KRS 532.025(2)(a)(1) authorizes a death sentence when "[t]he offense of murder...was committed by a person with a prior record of conviction for a capital offense."[5] Despite this plain and clear wording, in St. Clair v. Commonwealth, 140 S.W.3d 510, 567 – 570 (Ky. 2004), this Court ignored virtually every rule of statutory construction to find "record of conviction" as used in this statute now should be interpreted to mean nothing more than a jury's guilty verdict or a guilty plea accepted by a judge. This Court ignored over thirty years of death penalty jurisprudence to find that a

[5] Unfortunately, contrary to the statute and the explicit direction of this Court, the trial court refused to use the wording of the statute and authorized a death sentence if "[t]he murder was committed by the Defendant and the Defendant has a prior record of conviction of murder, a capital offense." TR 4 466; St. Clair v. Commonwealth, 140 S.W.3d 510, 571 (Ky. 2004). See Arg 3.

definition that would permit a defendant to be executed but not PFO'd somehow created a "meaningful basis" for imposition of a death sentence that is not "standardless and unchanneled." This Court should correct this unconstitutional anomaly. St. Clair, supra at 574 – 575 (J. Cooper, concurring and dissenting). See Directed Verdict argument filed in first appeal (1999-SC-29-MR). A 55 – 58.

If this Court persists in its unusual re-interpretation of the meaning of KRS 532.025(2)(a)(1), it must at least acknowledge the due process and ex post facto clauses prohibit its application of the new interpretation to St. Clair's re-sentencing. In St. Clair, supra, this Court overruled Thompson v. Commonwealth, 862 S.W.2d 871, 877 (Ky. 1993), a case precisely on point wherein this Court recognized case law going back seven decades mandated a finding that a " 'conviction, which of course means the final judgment' cannot be relied upon as a conviction if an appeal is being taken." This Court's abandonment of that long-standing law permits imposition of a death sentence under facts where no death sentence previously was authorized. Application of this newly interpreted law to St. Clair is barred by the ex post facto clause. Art. 1, §10, US Const.; § 19, KY Const.; Calder v. Bull, 3 U.S. 386, 390 (1798); Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964); Dale v. Haeberlin, 878 F.2d 930, 934 (6th Cir. 1989); St Clair, supra at 577 – 578 (J. Keller concurring and dissenting).[6]

At resentencing, St. Clair sought a directed verdict on the aggravator "murder...was committed by a person with a prior record of conviction for a capital offense" because at the time Mr. Brady was killed on October 6, 1991, St. Clair had

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[6] Application of this Court's contrary and novel interpretation to St. Clair also violates his rights under the due process clause. 14th Am., US Const.; § 2,3,11, KY Const.; Gall v. Parker, 231 F.3d 265, 305 (6th Cir. 2000); Tharp v. Commonwealth, 40 S.W. 3d 362-63 (Ky. 2000).

absolutely no record of conviction of a capital offense. TR 2 155 – 158, 172 – 173; TR 4 477 – 479; TH 6/15/05 2 – 7; TE 13 21 – 36; TE 21 36 – 37; TE 23 78 – 79. Final judgment was not entered in St. Clair's two Bryan/Murray County convictions until more than 6 weeks **after** Mr. Brady was killed. Id.; TE 20 218 - 228; TE 21 25. The two Choctaw County murders had not even been tried at the time Mr. Brady was killed and final judgment was not entered until 2 ½ years afterwards. TE 20 215 – 218.

Clearly, records of conviction that did not exist when Mr. Brady was killed could not establish the KRS 532.025(2)(a)(1) aggravator of "[t]he offense of murder…was committed by a person with a prior record of conviction of a capital offense." The evidence was insufficient to submit this aggravator to the jury and the prosecutor certainly fell short of establishing its existence beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 243, n 6 (2000); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v Arizona, 536 U.S. 584 (2002); In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 442 U.S. 307 (1979).

Additional problems were created by the trial court's refusal to instruct the jury that as a matter of law two of the four prior murder convictions did not meet the criteria to be considered as evidence of an aggravating factor. This Court, in its opinion reversing St. Clair's death sentence, made it clear these convictions did **not** meet the statutory criteria for the statutory aggravator sought by the prosecutor. St. Clair, supra at 571. This refusal to so advise the jury also resulted in a denial of St. Clair's constitutional right to a unanimous verdict. Hayes v. Commonwealth, 625 S.W.2d 583 (Ky.1981). There is no way to tell that all of the jurors were thinking of the qualifying prior convictions and not the clearly unqualified ones—or even worse, unqualified non-convictions (Keeling)—

when they found the aggravator. Because the instructions did not track the statutory language and failed to include a limiting admonition regarding the non-qualifying priors, it is very possible the jury relied on them in finding the aggravating factor. Without a definite standard against which to measure the prosecution proof, there is no way to know whether each juror based his or her finding upon competent evidence. Wells v. Commonwealth, 561 S.W.2d 85, 87 – 88 (1978). This was a clear violation of St. Clair's right to a unanimous jury verdict.

St. Clair was denied his rights to a unanimous verdict and proof beyond a reasonable doubt, a fair trial and reliable sentencing. Art. 1, §10; 5th, 6th, 8th, 14th, US Amends.; US Const.; § 1, 2, 3, 7, 11, 17, 19, 26, KY Const. His death sentence must be vacated and the case remanded for a new sentencing hearing at which life imprisonment would be the maximum penalty possible.

## 6. Prosecutorial Misconduct.

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). The Commonwealth's repeated misconduct rendered St. Clair's trial fundamentally unfair, manifestly unjust, and denied him due process of law. 6th, 8th, 14th Amends., US Const.; § 1, 2, 7, 11, 17, 26 Ky. Const.

### A. Opening Statement.

Preserved. TE 13 48. In opening argument, the Commonwealth stated "Ladies and Gentlemen, I am going to cut right to the chase here. The Defendant in this case is a serial killer." Defense counsel promptly objected and requested a mistrial. The trial court

overruled the motion for mistrial but did admonish the jury to disregard the last statement made by Mr. Smith. Id. 51; 56.

The only legitimate purpose of an opening statement is so to explain to the jury the issue they are to try so that they may understand the bearing of the evidence to be introduced. Lickliter v. Commonwealth, 249 Ky. 95, 60 S.W.2d 355, 357 (Ky. 1933). Sanborn v. Commonwealth, 754 S.W.2d 534, 544-45 (Ky. 1988) condemned such vilification and said "[t]here is no place in argument for scurrilous and degrading terminology."

The term "serial killer" has ominous connotations. This comment was particularly prejudicial in light of the improper introduction of KRE 404(b) evidence. See Arg. 12 and 17. Its sole purpose was to instill fear in the jurors and inflame their passions. The 'serial killer' reference sent the message that death was the only appropriate sentence because otherwise the killing would continue. See Urbin v. State, 714 So.2d 411, 420 n.9 (Fla. 1998).

**B. Improper Bolstering**

Preserved. TE 13 121. During the direct examination of Reese, the Commonwealth elicited testimony that Reese had pled guilty to Complicity to First Degree Murder, Capital Kidnapping, two counts of Possession of Stolen Property, Shooting with Intent To Kill and Arson. TE 13 120. Reese told the jury he had received two Life Without Parole for 25 years plus 50 years as punishment. Id. 122. Mr. Wright asked Reese the following:

MW: When you pled guilty, who was the prosecutor?

DR: Mike Mann.

MW: At the time that you plead guilty and Mike Mann was the prosecutor, did you know me?

DR: No, sir.

MW: Did you know David Smith?

DR: No, sir.

MW: Did you know Dana Todd?

DR: No, Sir.

MW: Had the Office of the Attorney General ever become involved with this case at the time you pled guilty?

DR: No, sir. TE 13 120.

Defense counsel objected, noting this line of questioning was irrelevant—the Commonwealth was the Commonwealth. It didn't matter what the name of the attorney was that offered Reese the deal—it was still the Commonwealth. The trial court overruled the objection. Mr. Wright stated the relevance was that "we" (the Assistant Attorney Generals) haven't made him any offers. The prosecution attempted to distance itself from the plea agreement entered into between the Commonwealth and Reese. This line of questioning was improper because (1) the Assistant Attorney Generals were representatives of the Commonwealth and (2) this line of questioning improperly bolstered Reese's credibility by dissociating Reese's plea agreement with the prosecutors at trial. The prosecutor wanted to show it was not the three current prosecutors- Smith, Wright and Todd- who had allowed Reese to escape death and receive favorable treatment in exchange for his testimony. Reese's plea agreement with the Commonwealth called Reese's credibility into question. It was improper and misleading

for the prosecutors to give the false impression that they were somehow separate and distinct from the Commonwealth.

**C. Improper comments Re Special Prosecutor's Office**

Unpreserved. TE 12 15. During the general voir dire, the Commonwealth made the following opening remark: "My name is Michael Wright. I am one of the Prosecutors in this case along with my Co-Counsel David Smith and Dana Todd. We are representatives of the Special Prosecutor's Office with the Attorney General." TE 12 15.

This comment placed undue emphasis on the entity prosecuting the case. It was irrelevant to this penalty phase proceeding whether the prosecutors came from the local Commonwealth Attorney's office or the Attorney General's office. The Commonwealth is the Commonwealth. The jurors had no way of knowing why or how the Attorney General's office came to be involved in this case. However, Wright's comment had the inherent connotation that the "Special Prosecutor's Office with the Attorney General" was somehow more significant or important that the Commonwealth Attorney's office, and was here because the case was too serious for the local prosecutor. This unduly prejudiced St. Clair and denied his rights under the 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 11, 17, 26, KY Const. Reversal is required.

**D. Improper Question Beyond Scope of redirect examination**

Preserved. TE 16 271. During the re-direct of Dr. Caruso, defense counsel elicited testimony that it was incumbent upon the doctor to prepare an accurate and impartial report when requested to perform an evaluation by defense counsel. TE 16 254. Dr. Caruso testified it was his professional obligation to do an objective evaluation. Id. On re-cross, the Commonwealth sought to attack Dr. Caruso's credibility by eliciting that

he earned more money for testifying than he did for seeing private patients. The Commonwealth inquired whether Dr. Caruso saw private patients who were covered by insurance. The Commonwealth was then allowed to ask, "[D]o you bill the insurance more or do you charge more for testifying for a criminal defense attorney?" Id. 271. Over defense objection, Dr. Caruso answered that he charged more for testifying. Id. 275.

In Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988), this Court disproved of inquiring into the fee of an indigent defendant's expert witness: "The prosecutor questioned an expert witness called by the defense about his fee, stating: 'And that's what you want the court to direct Henry County to pay you?' Such evidence served only to prejudice the jurors, citizens of Henry County, against appellant." Id. at 544. Likewise, the taxpayers were paying for St. Clair's expert witness as he was an indigent defendant. Eliciting information that the defense expert was charging more for testifying for St. Clair served only to prejudice the jurors against appellant.

Additionally, such information was beyond the scope of re-direct. KRE 611(b) codifies the "wide open" rule of cross-examination, but there are some limitations. In Commonwealth v. Maddox, 995 S.W.2d 718, 721 (Ky. 1997), this Court held there must be some connection between the proposed cross-examination and the facts that are in evidence.

In the case at bar, the trial court was confronted with whether the Commonwealth exceeded the scope of redirect examination. As Professor Lawson observes in Kentucky Evidence Law, § 3.20(5), p. 245 (4th ed.), "[r]ecross examination 'is normally confined to questions directed to explaining or avoiding new matter brought out on redirect.'"

(*quoting* Strong, McCormick on Evidence, §11(5th ed. 1999)) The prosecutor's recross did not explain any new matter brought out on redirect.

**E. "We are only asking for death."**

Preserved. TE 1 137. 155. During voir dire, the Commonwealth repeatedly informed the prospective jurors it was only asking the jurors for one penalty and one penalty only—the Death Penalty: "You are going to be asked to consider all of these five possible penalties but the Commonwealth is only going to ask you for one penalty in this case and it's [the death penalty]." TE 1 137; TE 6 211 Defense counsel objected on the grounds of relevancy and the fact that the prosecution couldn't "ask" for the Death Penalty unless and until it proved the existence of the aggravating circumstances. TE 1 138. The trial court encouraged the Commonwealth to explain to the prospective jurors that the prosecution could seek the death penalty only if the aggravating circumstance was proven. Id. Regardless, the Commonwealth persisted in the improper questioning with virtually every juror. TE 1 137, 155; TE 2 12, 62, 80, 100, 124, 145; TE 3 166, 183, 229, 279, 298; TE 4 321, 335, 351, 378, 395; TE 5, 27, 55, 71, 88, 108, 136; TE 6, 168, 203, 211, 227, 248, 265, 277..

The Commonwealth misstated the law. It could not ask for the death penalty at all unless and until the jury found beyond a reasonable doubt it had proved the existence of an aggravator. To open voir dire of a prospective juror with the statement that the Commonwealth was asking for one penalty and one penalty only—the death penalty—was prejudicial. The Commonwealth cannot prove this error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Reversal is required. 5th, 6th and 14th Amends., U.S. Const.; Sec. 2, 7, and 11, Ky. Const.

**F. Closing Argument**

**"If not this case then what case?"** Preserved. TE 24 13. TR 3 437. In its closing penalty phase argument, the Commonwealth stated:

> Folks, we asked you at great length during jury selection, both sides, over, and over, and over, and over again, the judge, too, if the facts are there, can you give the Death Penalty. We were very up-front with you that, that is the only sentence we are seeking in the case and now you know why; now you know why. You told us you could do it. Ladies and gentlemen, if not this case then what case? TE 24 13.
>
> "If not this case then what case when a Death Sentence be imposed?" TE 24 14.
>
> "Dear God, deliver me from this! If not this case then what case? What case?" TE 24 37

Previous to closing arguments, St. Clair filed a Motion in Limine specifically addressing this very issue. TR 3 437. Regardless, the trial court overruled defense counsel's objection. TE 24 14. In Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989) this Court condemned the prosecutor's statement, "But, ladies and gentlemen, if there ever was a case where the death penalty was deserved this is it." That exact same argument was made here and it was error.

**"Serial Killer"**-Preserved. TE 24 18. During closing argument, the Commonwealth stated, "You heard Dr. Walker testify about the definition of a serial killer. A serial killer is somebody who murders...". TE 24 17-18. Defense counsel objected on two grounds. First, the Commonwealth misstated the evidence in that Dr. Walker did not mention anything about a 'serial killer.' In fact, the only person that used the term 'serial killer' was the Commonwealth during its opening argument. "[M]isquotations of the evidence should not be made because of their tendency to mislead the jury." Bowling v. Commonwealth, 279 S.W.2d 23, 24 (Ky. 1955). While

prosecutors enjoy considerable latitude in presenting arguments to a jury, "it is the duty of the prosecuting attorney to confine himself to the facts in evidence and fair inferences that may be drawn therefrom." Williams v. Commonwealth, 644 S.W.2d 335, 338 (Ky. 1982).

The trial judge sustained the motion as it related to attributing the statement to Dr. Walker, but overruled the objection as it related to the term "serial killer." Id. 20. As such, the prosecutor continued to refer to St. Clair as a serial killer, even a "super serial killer," a "serial killer to the second power," and an "elite serial killer." (TE 24 21) Sanborn v. Commonwealth, 754 S.W.2d 534, 544-45 (Ky. 1988) condemned such vilification and said "[t]here is no place in argument for scurrilous and degrading terminology." The term "serial killer" has sinister connotations. This comment was particularly prejudicial in light of the inappropriate introduction of improper KRE 404(b) evidence. Its sole purpose was to inflame the passions of the jury and convey the message that death was the only appropriate sentence because otherwise the killing might continue. The prosecutor's comments were not isolated but spread throughout his argument and meant to dehumanize St. Clair thus instilling the jury with fear and minimizing its sentencing responsibility. Berger v. United States, 295 U.S. 78 (1935).

**Misstatement of Evidence.** Preserved. TE 24 35. During closing, the Commonwealth made the following remarks:

> **You heard the medical examiner. Mr. Brady's head was bowed.** I think you can infer from all of that, I think the logical conclusion is Mr. Brady was praying. He was begging for his life and what did he get? A shot down through his face and then a shot to his side. That's how that it happened. What in the world, what in the world was going through that man's mind when he was being taken out there in the woods?

TE 24 35. The medical examiner did not testify that Mr. Brady's head was bowed. Rather, the prosecutor asked the medical examiner if the trajectory of the first shot would be consistent with Mr. Brady being down on his knees and having had his head bowed. TE 17 156. She answered yes. Id. On cross-examination, the doctor acknowledged one could think up any number of scenarios her findings would not be inconsistent with, "you just have to give one or the other positions, and then put the body in the second position." TE 18 162. The prosecutor should not "make comments not justified by the facts." Kitchen v. Commonwealth, 291 Ky. 756, 165 S.W.2d 547, 553 (1942). "[M]isquotations of the evidence should not be made because of their tendency to mislead the jury." Bowling v. Commonwealth, 279 S.W.2d 23, 24 (Ky. 1955). While prosecutors enjoy considerable latitude in presenting arguments to a jury, "it is the duty of the prosecuting attorney to confine himself to the facts in evidence and fair inferences that may be drawn therefrom." Williams v. Commonwealth, 644 S.W.2d 335, 338 (Ky. 1982).

**Golden Rule Argument.** Preserved. TE 24 35. Defense objected to the following remarks during closing argument and asked for an admonishment:

> He was begging for his life and what did he get? A shot down through his face and then a shot to his side. That's how that it happened. What in the world, what in the world was going through that man's mind when he was being taken out there in the woods? (TE 24 35)

Later, the Commonwealth continued along the same lines:

> I don't know what went through Mr. Brady's mind during all of that time; that hell ride up to Boston to that shooting gallery, that march into the woods. I don't know what went through his mind. I don't know for sure what went through Dennis Reese's mind. I know what went through this Defendant's mind. You don't know for sure what went through Mr. Brady's mind. I can sure imagine. I can sure imagine him hoping, and wishing, and praying to Almighty God to deliver him from the unspeakable atrocities that awaited him up there in those woods! Dear

> God, deliver me from this! If not this case then what case? What case? TE 24 37.

It was prejudicial error for the Commonwealth to ask the jury what in the world could have been going through Mr. Brady's mind before he was shot. This type of argument, inviting the jury to put itself in the victim's situation, has long been condemned in Kentucky. Lycans v. Commonwealth, 562 S.W.2d 303 (Ky. 1978) (improper for prosecutor to argue, "'[s]uppose you own a store and somebody comes in on you and does that to you. What's it worth?"); Dean v. Commonwealth, 777 S.W.2d 900, 904 (Ky. 1989) (denial of fundamental fairness for prosecutor to argue, "Can you imagine the fear that went through the life of [the victim] on this day.... Can you imagine the fear and embarrassment...the terror...the humiliation...?") "This Court has disapproved sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant's culpability" and held "[t]he prosecutor's emotional and inflammatory appeal to the jury on behalf of [the victim's] family undermined the accused's right to a fair trial." Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ky. 1991). Such is improper and should not be permitted.

**I am here to speak on behalf of Frank Brady.** Unpreserved. TE 24 10. The prosecutor made the following remark during closing argument:

> "Frank Brady is not here to speak for himself, but I am. I have reminded other prosecutors in public speaking engagements, many times, something that occurred to me a number of years ago. You think about all the different professions, all the different walks of life, all the different human endeavors in the whole world, who more than a prosecutor is called upon to speak more often for those who cannot speak for themselves? So I am here to speak on behalf of Frank Brady." TE 24 10.

The prosecutor's comments created the impression the prosecution was acting on behalf of the victim rather than the Commonwealth. "Of course, a Commonwealth's Attorney is just that—a representative of the Commonwealth, not the victim, and it is improper for the Commonwealth's Attorney to suggest otherwise." Thompson v. Commonwealth, 147 S.W.3d 22, 46 (Ky. 2004). As was stated in Goff v. Commonwealth, 44 S.W.2d 306, 308 (Ky. App. 1931):

> An attorney for the commonwealth should never forget his high position; should never forget it is his duty to protect the innocent just as much as it is his duty to prosecute the guilty. He represents all the people of the commonwealth, including the defendant; he should in an honorable way use every power that he has, if convinced of the defendant's guilt, to secure his conviction, but should always remember he stands before the jury clad in the official raiment of the commonwealth, and should never become a partisan.

Reversal is required.

**My wife and I teach Sunday School.** Unpreserved. TE 24 25. The prosecutor made the following remarks during closing argument:

There was a little boy about that age named Spencer. He was in a Sunday School class my wife and I teach, and he cried for his momma so bad. She was out in the sanctuary and he missed her so much shot down the whole Sunday School Class. We had the toddlers and I never had so much tears and shot on my shoulder in all my born days. And that little boy shut us down because he was crying for his mamma. I wonder if that little girl whose picture was torn up and thrown way, I wonder if she cried. TE 24 25.

There simply was no valid reason for the prosecutor to inform the jury that he and his wife were Sunday School teachers. This remark was intended to bolster the prosecution's credibility. The inherent connotation in the prosecutor's improper remark is that he is a Christian and a Christian does not lie and always tells the truth. Such a remark is prejudicial and has no place in the courtroom.

**When the opposing team is making a run** -Preserved TE 24 36. After the bench conference wherein two objections to the prosecutor's closing argument were dealt with (the bowing of the head and what was going through Mr. Brady's mind) the prosecutor moved from the bench, turned around and announced to the jury "When the opposing team is making a run you call a time-out." TE 24 36. This improper comment truly added insult to injury. Not only did it undermine the integrity of the proceedings, but it bolstered the prosecution's improper closing arguments. It is improper for a prosecutor to make attacks on defense counsel and refer to "tactics of the [defense] attorneys." Sanborn v. Commonwealth, 754 S.W.2d 534, 544 (Ky. 1988); Kitchen v. Commonwealth, Ky., 165 S.W.2d 547, 552 (Ky. 1942); People v. Ortiz, 509 N.Y.S.2d 418 (A.D.2 Dept. 1986).

**G. Prosecutor's adjustment of hat.**

Preserved. TE 15 3. In the 1998 prosecution of St. Clair, Dennis Reese identified and testified about several items of clothing recovered from Mr. Brady's truck by the Kentucky State Police. Reese testified some of the items belonged to St. Clair. Reese identified a Commonwealth Exhibit, a camouflage baseball cap with an adjustable band, as belonging to St. Clair. OTE 11 1406-1407 Appendix 68-71. When the hat was in possession of the Kentucky State Police and when it was introduced into evidence, the adjustable band was set for a small head size. Although not specifically noted in the record, defense counsel Steve Mirkin placed this cap on St. Clair's head in front of the jury to show it would not fit. OTE 24 3098. Appendix 70-71. The defense, in its closing argument, pointed out to the jury the hat so adjusted could not have fit the defendant. OTE 23 2926-2927.

When Assistant Attorney General Wright made the closing argument for the Commonwealth, he altered the cap by separating the adjustment tabs and re-adjusting them to a larger size. OTE 25 3089-3098, 3096-3098. Appendix 72-81. Before Mr. Wright altered the hat's size the hat did not fit St. Clair. When Mr. Wright altered the hat he destroyed the exculpatory value of the hat.

Throughout the history of this case, St. Clair has persistently protested about the prosecution's adjustment of the cap. Specifically in this resentencing trial, St. Clair filed at least three *pro se* motions about the prosecutor's 1998 adjustment of the cap. TR 2 228, 245; TR 3 412. During the middle of this resentencing trial, St. Clair made a pro se motion to dismiss the indictment due to prosecutorial misconduct because he noticed that the camouflage hat had *once again* been altered. TE 15 3-5.

The camouflage hat, with its original size adjustment, was obviously a significant item of evidence. The initial adjustment made to the hat by the Commonwealth destroyed the evidentiary value. The second adjustment to the hat destroys any claims St. Clair may have had regarding the prosecution's alteration of the hat.

It is axiomatic that a piece of evidence must be in substantially the same condition as it was when collected to be introduced at trial. See KRE 901; Beason v. Commonwealth, 548 S.W.2d 835 (Ky. 1977). Prior to Mr. Wright's alteration the hat was of critical exculpatory value; after the alteration the hat lost that value. Now that the hat has once again been altered, St. Clair has yet again lost critical evidence. Because of the nature of the charges and the damage done to St. Clair's right to present a defense, dismissal of the indictments is the appropriate remedy for the Commonwealth's actions. See Crane v. Kentucky, 476 U.S. 683 (1986) on right to present a defense.

7. The Governors' Executive Agreement

This issue is preserved. TE 13 81 – 87. During opening statements, counsel mentioned that in 1995, the governors of Kentucky and Oklahoma entered into an agreement concerning St. Clair. Id. The prosecution objected and argued that agreement was irrelevant. Id. This agreement established if Michael St. Clair were not sentenced to death in Kentucky, he would be returned to Oklahoma for incarceration in an underground maximum security facility. Id. Counsel argued the jury should be aware of the consequence of their verdict, the agreement was part of the evidence the Commonwealth had submitted in the case and it was mitigating. Counsel also argued the agreement would rebut any Commonwealth argument at closing that since St. Clair committed this crime while on escape he is a likely escape risk and only the death penalty would ensure he would not escape again. Id. The trial court sustained the Commonwealth's objection. Id.

Clearly, a defendant facing the death penalty is entitled to present mitigating evidence. KRS 532.025, Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992). The trial court's ruling denying St. Clair the right to present evidence in mitigation was erroneous. KRS 532.025(2)(b) states that "[t]he defendant may introduce evidence in mitigation or in support of leniency."

It is especially important the jury be given as much information as possible to assist them in determining a penalty when they are charged with only that task. Juries who determine both guilt and punishment naturally hear the whole story. These jurors did not—they were read summaries of testimony, saw few live witnesses and thus it was vital that they be provided with all relevant evidence, especially mitigating evidence. As

this Court stated in Boone at 814, a jury should not be expected "to sentence in a vacuum without any knowledge of the defendant's past criminal record or *other matters that might be pertinent to consider in the assessment of an appropriate penalty*." (Emphasis in original).

This evidence was clearly mitigating. The Commonwealth recognized its value and wanted to ensure the jury didn't find out about the agreement. It is likely the jury felt if they did not impose the death penalty, there remained a chance St. Clair may escape custody again and imposed the penalty to preclude that eventuality. They may not have done so had they known Oklahoma was ready to ensure he never escaped custody again. The evidence had clear mitigation value and it was error to exclude it.

The failure of the trial court to allow the introduction of mitigation violated Kentucky statutory law as well as St. Clair's right to due process and reliable sentencing. $8^{th}$, $14^{th}$ Amends, US Const.; §§ 2, 11, 17 KY Const. St. Clair's sentence should be reversed and remanded.

**8. Improper Limits Placed On Individual Voir Dire.**

Preserved. Counsel asked whether questions concerning the jurors' opinions on the death penalty would be allowed. TE 2 3. The trial court stated it would not allow such questions. During individual voir dire of Hines, the prosecution objected to counsel's question concerning mitigation and whether Hines would require mitigation to be directly related to the crime or would accept and consider more general mitigation. TE 3 208-209. The trial court sustained the objection, holding counsel could only ask if the prospective juror would follow the court's instructions. TE 3 211-212.

Botos expressed reservations about imposing the minimum penalty or some term of years and defense counsel endeavored to explore her reservations, but was stopped by objection of the Commonwealth. TE 5, 145. Wagner told the parties she had given a lot of thought to the question of the death penalty and counsel expressed a desire to explore her feelings on the death penalty, but was forestalled by the trial court. TE 2 69-72.

During individual voir dire of Massey, counsel attempted to question her concerning her statement that "normally a murder trial you think of, you know, the maximum penalty that you can think of..." TE 4 361-362. Counsel attempted to discern whether she would be able to consider both the minimum and maximum sentence, but was estopped by prosecution objection. TE 4, 361. The court sustained the motion. TE 4 363.

In order to secure a fair and impartial jury, a defendant's right to question prospective jurors as to the biases and prejudices cannot be abridged. The right to an impartial jury is basic to our system of justice. Duncan v. Louisiana, 391 U.S. 145 (1968). The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." Ham v. South Carolina, 409 U.S. 524 (1973) (Marshall, J., concurring).

Pointer v. United States, 151 U.S. 396, 408 (1894), found the right to intelligent exercise of challenges is "one of the most important of the rights secured to the accused." The Court stated,

> Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such

> inspection and examination of him as is required for the due administration of justice.

Id. at 408-409.

In Morgan v. Illinois, 504 U.S. 719, 729-730 (1992) the Court restated this principle: "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." "Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

A fair jury cannot be formed in a vacuum. That point was made in United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973). "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. It follows, then, that a requested question should be asked if an anticipated response would afford the basis of a challenge for cause." Clearly, counsel's questions here would have prompted answers that would have provided for the bases for challenges for cause as they would have fleshed out the opinions of the jurors more completely and fully and allowed also for the more intelligent use of peremptory strikes.

"The purpose of voir dire is to determine whether a juror possesses necessary qualifications, whether he has prejudged the case, and whether his mind is free from

prejudice or bias so as to enable a party to ascertain whether a cause for challenge exists, and to ascertain whether it is expedient to exercise the right of peremptory challenge." Sizemore v. Commonwealth, 306 S.W.2d 832, 834 (Ky. 1957). This implies an inquiry sufficient to ascertain whether a challenge for cause exists with regard to members of the jury venire.

Indeed, this Court said in Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky.1991), "A meaningful voir dire examination by both sides is a sine qua non to the seating of a fair and impartial jury." "A wide latitude is allowed counsel in examining jurors on their voir dire." Webb v. Commonwealth, 314 S.W.2d 543, 545 (Ky. 1958).

United States v. Johnson, 584 F.2d 148, 155 (6th Cir. 1978), held it is reversible error if, by unduly restricting voir dire, the peremptory challenge right is substantially impaired. Furthermore, an error in refusing to allow a proper question that could have formed the basis for a challenge for cause is not subject to harmless error analysis. United States v. Blount, supra, 479 F.2d at 651. See also, United States v. Hill, 738 F.2d 152 (6th Cir. 1984).

Further, St. Clair had a statutory right to voir dire the jurors individually regarding mitigation. KRS 532.025 (2) provides "in all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances... otherwise authorized by law and any of the following statutory...mitigating circumstances which may be supported by the evidence." As a matter of due process under both the state and federal constitution, a juror in Kentucky must be able to follow the law. KRS 532.025 is clear and unambiguous. Mitigation by definition is a reason to give a lesser punishment. By statute,

a juror must be able to consider the statutory and non-statutory mitigation offered by the defendant, and consider it a reason to give a lesser punishment. Therefore, a defendant is entitled to question prospective jurors concerning their consideration of mitigation evidence.

It has long been recognized "in capital cases the fundamental respect for humanity underlying the Eighth amendment...requires consideration of the **character and record of the individual offender** and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." Woodson v. North Carolina, 428 U.S. 280 (1980)(emphasis added). In the instant case, the trial court prohibited counsel from questioning Hines about whether he would consider mitigation about St. Clair's background and upbringing, or whether he would require that mitigation be directly related only to the crime.

Eddings v. Oklahoma, 455 U.S. 104 (1982), held in addition to not being precluded from considering as mitigation any aspect of the defendant's character, the sentencer also may not refuse to consider any relevant mitigation offered by the defendant. At the time Eddings was sentenced to death, the Oklahoma death penalty statute provided that in the sentencing proceeding "evidence may be presented as to any mitigating circumstances." In mitigation, Eddings presented substantial evidence of a "troubled upbringing" just as in St. Clair's case.

The only way to determine a juror's view on specific mitigation is to ask them. Counsel wanted to inquire of jurors whether or not they would consider all mitigation as having the same value. Under Eddings, if any of these jurors said they would not, they would have been excluded for cause based on their inability to consider the mitigating

offered by the defendant. Therefore, it was clear error to prevent counsel from asking jurors about their opinions on mitigation.

The limitations placed upon defense counsel during the individual voir dire with regard to non-statutory mitigation denied St. Clair his constitutional right to a fair and impartial jury and his right to an adequate voir dire so he could exercise his peremptory challenges and make challenges for cause in a meaningful and intelligent way. KY Const., §§ 2, 3, 7, 11, 17; US Const. 5th, 6th, 8th, 14th Amends. Reversal is required.

**9. Refusal To Correctly Order Individual Voir Dire Pursuant To RCr 9.38.**

This issue is preserved. Defense counsel requested that they question jurors first during voir dire. TR 2, 185-188; TH 8/10/05 61 – 70. Counsel argued the plain language of RCr 9.38 states "upon request, the court shall permit *the attorney for the defendant* and the Commonwealth to conduct the examination..." and should be interpreted as commanding that during individual voir dire, the defense should be allowed to question before counsel for the Commonwealth. Counsel noted the rule's language concerning non-capital cases reads in the reverse, "the attorney for the Commonwealth and the defendant or the defendant's attorney..." indicating the traditional order of the Commonwealth proceeding first. Counsel also pointed out KRS 532.025(1)(a) reversed the traditional order of closing arguments in capital cases, allowing for the defense to have the final word and that the two statutes should be read together to form a scheme in capital cases that ensures supreme justice for the defendant in cases with such high stakes. The trial court overruled the motion.

The plain language of a statute or rule should always be given consideration in interpreting that statute. "The obligation of the Court is to construe the statutes so as to effectuate the plain meaning and unambiguous intent expressed by the law." Commonwealth v. Sears, 206 S.W.3d 309, 311 (Ky. 2006). RCr 9.38 clearly intends the traditional order of questioning be altered in capital cases.

KRS 532.025(1)(a) establishes that traditional orders of presentation are altered in capital cases. "The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument." This is a clear nod to the increased import and regard given by the legislature to cases which involve the ultimate penalty.

The clear language of the Rule requires defense counsel be allowed to inquire of jurors first, with the Commonwealth following. It was unfairly prejudicial error not to follow the Rule and reversal is required. 14th Amend., US Const.; § 1, 2, 11 KY Const.

## 10. Improper Denial Of Defense Challenges For Cause.

Defense counsel made motions to strike sixteen jurors for cause that were denied. St. Clair exercised all of his peremptory strikes. This issue is preserved for review.

**Melton**'s husband and the Commonwealth's investigator are cousins. TE 1 105. Counsel moved to strike her for cause because of the close relationship she had with a member of the prosecution team who would sit at counsel table for the entire proceeding. The motion was overruled. TE 1 129.

**Hatcher**'s response made it clear she would not be able to consider the full range of penalty. When asked if she could consider giving a sentence of twenty years after finding the prosecution proved an aggravator, she stated she could not. TE 2 37. Counsel challenged her for cause, citing her inability to consider all available penalties. TE 2 42. The trial court overruled the motion, citing Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003) and finding Hatcher had been rehabilitated. TE 2 44.

**Jameson** expressed reservations about imposing the minimum penalty. TE 2 83. Defense counsel made motion for excusal for cause. TE 2 91. The motion was overruled. Id.

**Jetter** clearly stated she would not be able to consider the minimum punishment if the defense put on no evidence, thus shifting the burden. TE 2 109. She also had been exposed to pre-trial publicity. TE 2 104. Defense counsel made motion to excuse her for cause. TE 2 111. It was overruled. TE 2 113.

**Marksberry** had read an article in the local newspaper the week trial started. TE 5 114. Defense counsel asked for her to be excused for cause because the article informed readers about the prior verdict and all of the *pro se* pleadings filed by St. Clair. TE 5 115. The motion was denied. Id.

**Ray** had read articles in the local paper and in the Louisville Courier-Journal about the re-sentencing and the prior trial. TE 4, 393-394; 400-401. The defense moved to strike her for cause because of her exposure to information and was denied. Id. at 404-405.

**Botos** was questioned extensively after giving evasive answers to whether she could consider the minimum penalty. TE 5, 144. Counsel attempted to question her

closely but the Commonwealth objected and the court sustained the objection. Id. at 147. The defense moved to strike her for cause and was denied. Id. at 150.

**McCalvin** made it clear she could not consider the minimum penalty. She had been asked: "Can you see yourself voting... for a sentence of 20 years?" She responded "No." Counsel then asked if she could consider a 21-year, 25-year or a 30-year sentence and again McCalvin made it clear she could not consider a term of years if the jury found an aggravator had been proven. TE 6 175. Defense counsel moved to strike her for cause and was denied. TE 6 177.

**Polson** made it clear if the prosecution proved the aggravator, he would impose the death penalty unless the defense presented compelling mitigation evidence, thus shifting the burden. TE 6 296. Counsel asked the court to strike him for cause, and was denied. TE 6 300, 303.

**Stevens**' answers were unambiguous he would not impose a penalty that included a possibility of parole. TE 7 326. The trial court endeavored to "rehabilitate" the juror and pronounced him qualified, over defense counsel objection. TE 7 334, 337.

**Harrison** clearly stated he would be unable to consider the minimum without mitigating evidence. TE 8 135. Defense counsel moved the court to strike the juror for cause. TE 8 139. The trial court overruled the motion. TE 8 142.

**Wilkinson** had overheard other jurors waiting to be questioned talking about the case and the fact that it had been "going on" for a long time. TE 9, 174. Counsel moved to strike him for cause and was denied. Id. at 199.

**Eldridge** expressed his belief in the Biblical notion of just punishment—"an eye for an eye and a tooth for a tooth." TE 9 235. He stated a sentence of death would

satisfy that belief. Counsel moved for him to be struck for cause and was denied. TE 9 248.

**Bartley** was aware St. Clair had previously been sentenced to death. TE 9 271. He also made it clear the defense had the burden of proving mitigation or else he would impose the death sentence. TE 9 276. Defense counsel moved for him to be struck and the motion was denied. TE 9 280-281.

**Schultz** had viewed an episode of "America's Most Wanted" that dramatized the murder of Frank Brady on two separate occasions. TE 12 40. The trial court overruled defense counsel's motion to strike him for cause. TE 12 42.

**Massey** had knowledge of the prior death sentence for St. Clair. TE 4 357. Defense counsel's motion for cause was overruled. TE 4 358.

**Inability to consider mitigating evidence.** Eddings v. Oklahoma, 455 U.S. 104 (1982), held that in addition to not being precluded from considering as a mitigating factor any aspect of the defendants character, the sentencer also **may not refuse to consider any relevant mitigating evidence** offered by the defendant. At the time Eddings was sentenced to death, the Oklahoma death penalty statute provided that in the sentencing proceeding "evidence may be presented as to any mitigating circumstances."

Under Eddings, a sentencer must be capable of 1) considering the full range of punishment, 2) considering mitigation in general terms, and 3) considering specific circumstances he personally finds mitigating. A sentencer qualified to sit on a capital jury must be able to consider and give effect to any and all relevant mitigating factors offered by the defendant.

In Morgan v. Illinois, 504 U.S. 719, 739 (1992), the Supreme Court stated,

> "Surely if in a particular case the judge, who imposes sentence should the defendant waive his right to jury sentencing... was to announce that, to him or her, mitigating evidence is beside the point and that he or she intends to impose the death penalty without regard to the nature or extent of mitigating evidence if the defendant is found guilty of a capital offense, that judge is refusing to follow the statutory direction to consider that evidence and should disqualify himself or herself. Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial".

Furthermore, a juror does not pass this "mitigation" hurdle merely by stating he or she can "consider the evidence." The juror must be able to consider the evidence offered by the defendant, and must consider that evidence as mitigating i.e., a reason to impose a lesser punishment. In Penry v. Lynaugh, 492 U.S. 302 (1989), the Court addressed a Texas statute that failed to give an instruction to the jury that it could consider the evidence offered by the defendant as mitigating. The Court noted the difficulties a defendant faces in offering mitigation evidence by comparing it to a double-edged sword. The Court acknowledged the truism that mitigation "may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Penry, at 324. Simply put, not only must a potential juror be able to consider mitigating evidence, they must be able to consider it as a reason to impose a lesser punishment.

Jetter clearly stated that she would not be able to consider the minimum punishment if the defense put on no evidence, thus shifting the burden. TE 2 109. Jameson expressed reservations about imposing the minimum penalty. TE 2 83. McCalvin made it clear that she could not consider the minimum penalty. TE 6 175.

Eldridge expressed he believed in the Biblical notion of just punishment—"an eye for an eye and a tooth for a tooth." TE 9 235. He stated that a sentence of death would satisfy that belief. It was error to refuse to strike these jurors for cause.

**Inability to Consider Full Range of Penalties.** The court abused its discretion when it overruled counsels' challenges for cause to Hatcher, Jameson, Jetter, McCalvin, Stevens, and Harrison. A defendant is guaranteed the right to a fair and impartial jury. 6th, 14th Amends., US Const.; §§ 2, 7, 11, KY. Const.; RCr 9.36(1). To ensure this right, the defendant may challenge a juror for cause "[w]hen there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence." RCr 9.36(1).

Because these jurors expressed a predisposition to impose more than the minimum and an inability to consider lesser penalties, they should have been excused for cause. Springer v. Commonwealth, 998 S.W.2d 439, 456 (Ky. 1999); Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky. 1991). In Grooms v. Commonwealth, 756 S.W.2d 131, 137 (Ky. 1988), this Court recognized "a juror should be excused for cause if he would be unable in any case, no matter how extenuating the circumstances may be, to consider the imposition of the minimum penalty prescribed by law."

The 6th Amendment "right to a jury trial guarantees an accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717 (1961). §11, KY Const., and RCr 9.36(1) also guarantee a defendant a "trial by an impartial jury." RCr 9.36(1) allows a challenge for cause "[w]hen there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the

evidence." Furthermore, a "defendant has been denied the number of peremptory challenges allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause." Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993). See also Fugate v. Commonwealth, 993 S.W.2d 931, 938-39 (Ky. 1999). St. Clair was forced to use peremptory strikes to rid the panel of 8 of these infirm jurors, this depriving him of their proper use and rendering his strikes rehabilitative rather than affirmative. Counsel struck Bartley, Eldridge and Schultz. Sealed Exhibits: Strike Sheets. Jetter was a member of the jury. Id.

Pursuant to the 6th Amendment's guarantee of an impartial jury, "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Wainwright v. Witt, 469 U.S. 412, 424, (1985) quoting Adams v. Texas, 448 U.S. 38, 45 (1980). Under this standard, a juror who cannot comply with the constitutional and statutory mandates to consider the full range of penalties, or who is "substantially impaired" in considering all penalties should be disqualified for cause. This Court made it clear in Grooms v. Commonwealth, 756 S.W.2d 131, 134-138 (Ky. 1988), jurors in a capital case must be able to fully and properly consider the entire sentence range.

The jurors objected to by counsel for their failure to consider the entire panoply of penalties should have been struck for cause upon defense counsel's motion. Hodge v. Commonwealth, 17 S.W.3d 824, 837 (Ky. 2000); Springer v. Commonwealth, 998 S.W.2d 439, 456 (Ky. 1999); Thompson v. Commonwealth, 862 S.W.2d 871, 875 (Ky.

1993); Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky. 1991). Reversal and a new sentencing are required. 5th, 6th, 8th, 14th Amend., U.S. Const.; §§ 1, 2, 3, 7, 11, 26, KY Const.

**11. Inconsistent Rulings And Improper Excusals For Cause.**

This issue is preserved. During individual voir dire, many jurors who indicated that they would tend to impose the harshest penalty were "rehabilitated" by the court and retained over defense objection. For example, Daphne Hatcher indicated she would likely impose the death penalty and could not consider lesser penalties until she was magically questioned by the court. TE 2 27-54. On the other hand, Charles Jameson expressed difficulty considering the minimum and the defense moved to strike him for cause, which was denied. Id. at 91.

Donna Jetter indicated if the Commonwealth proved its case, and the defense put on no evidence, she could not consider the minimum punishment. Id. at 102. The court denied the defense motion to strike her from the panel. Laura Amshoff said she could not impose the death penalty and was excused over defense objection. TE 3 220. Danny Donahue expressed reservations about imposing the death penalty. He stated he wasn't sure he would be able to impose the death penalty and he was excused from service. TE 4 321, 326.

Philip Simon was excused because he expressed reservations about imposing the death penalty. TE 6 157. After being asked if he could consider all five possible punishments, he responded, "I probably wouldn't want to impose the Death on someone else." Id. Dori McCalvin expressed difficulty in imposing the minimum sentence and

the defense moved to excuse her for cause and was denied. Id. at 160. Donnie Bennett was the next juror questioned, but after expressing grave reservations about imposing the death penalty, he was excused. Id. at 268. Gary Polson said that he would automatically vote for the death penalty and the defense would have the burden of convincing him to impose a lesser sentence, but the trial court overruled the defense's motion to strike him. Id. at 303. William Stevens made it clear that he could not consider any sentence wherein St. Clair might someday be paroled and the defense moved to excuse him for cause, but was denied. TE 7 337.

As is clear from a review of the trial court's action in striking jurors opposed to the death penalty, while rehabilitating jurors who stated they could not impose the minimum, the jury was stacked with jurors who were more inclined to impose the ultimate penalty. A review of the voir dire makes it clear when jurors expressed reservations about imposing the death penalty, they were immediately struck, but jurors who expressed difficulty in imposing the minimum were retained and rehabilitated by the court.

The excusal for cause of prospective jurors because of their beliefs on the death penalty leads to the deprivation of the right of a jury of one's peers. See Arg. 34. Further, the trial court altered the way it questioned jurors after it became apparent too many death-inclined jurors would be struck if changes were not made. Defense counsel raised this issue to the court and pointed out the court's question changed from, "Would you automatically vote for or against each potential punishment, no matter what the facts might be?" to "You may be asked if you can honestly and sincerely vote for each of these (punishments)?" TE 5 14-15. Counsel noted the court's action was diluting the value of

counsel's questions and would lead to an unfair result. The trial court dismissed counsel's concerns, and stated the change occurred in an endeavor to speed things up. Id. at 17. He stated asking jurors if they would "automatically" vote for one punishment or another and asking if they would vote for or against any of the penalties was essentially the same question. Even the court, however, recognized that simply was not true—if the change speeded up the questioning, then it also obfuscated the true feelings of the jurors as those jurors whose responses were troubling would be questioned more and obviously the change made it more likely the jurors would not give objectionable answers.

The automatic dismissal of jurors who expressed reservations about the death penalty, while rehabilitating jurors inclined to impose it, coupled with the trial court's pointed change in questioning violated St. Clair's rights under 5th, 6th, 8th, 14th Amends., US Const.; §§2, 3, 7, 11, 17, 26 KY Const. Reversal is required.

**12. Improper Bolstering Of Reese And Improper Other Crimes Testimony.**

This issue is preserved. TE 13, 123-125, 128, 137; TE 14, 219, 239. .

Mere minutes after co-indictee Dennis Reese took the stand, the Commonwealth attempted to bolster his questionable credibility. TE 13, 123. The prosecution asked Reese, "At any time has anyone representing the Commonwealth told you what to say here?" Id. Reese answered, "No, sir, just other than tell the truth." Id. at 123-124. Defense counsel objected. Id. at 124. Counsel complained the Commonwealth was attempting to bolster a witness' credibility when it had not yet been attacked. Id. The prosecution argued the defense had offered the testimony of a witness to challenge Reese's capacity for memory at the first trial and this re-sentencing was "just a

continuation of that trial," so the action was proper, and the credibility of a witness was always at issue. Id. Defense counsel responded that since credibility of all witnesses is always at issue, to interpret that as allowing for bolstering before attack would render the rules against bolstering before attack meaningless. Id. at 125. Further, counsel pointed out the witness from the first trial who attacked Reese's ability to remember events was not being recalled at this proceeding so this jury would not hear that testimony. Id. The objection was overruled. Id. at 126. Counsel objected several more times during Reese's testimony and made multiple motions for mistrial. TE 13, 128, 137; TE 14, 219, 239.

St. Clair and Reese were jointly indicted for the murder of Frank Brady. St. Clair v. Commonwealth, 140 S.W.3d 510, 524 (Ky. 2004). Reese entered into a plea agreement to a sentence of LWOP/25 plus an additional 50 years, and agreed to testify against St. Clair. TE 13, 122, 123. The testimony of Dennis Reese was instrumental in securing a guilty verdict against St. Clair and apparently the prosecutors planned on using him to secure another death verdict and had to ensure his lack of credibility wouldn't harm their chances.

The prosecution began it's questioning of Reese by establishing none of the prosecutors involved in St. Clair's re-sentencing proceedings had prosecuted Reese. TE 13 120. He was also questioned about the entry of his guilty plea and about his culpability for the death of Mr. Brady. Id. at 122-123. Predictably, Reese claimed St. Clair was the leader of the crime spree and he simply followed along, and acted only in response to St. Clair's directions. TE 15 22. He told the jury, despite not wanting to participate in the murder of Frank Brady, he nonetheless never tried to help Mr. Brady because "it wouldn't have done no good. It probably got myself killed." TE 14 239.

Attempting to minimize the harm their case and credibility may have suffered had the defense introduced evidence of favorable treatment of Reese by the prosecution, the Commonwealth introduced a letter written by two members of the prosecution team to the warden of the Oklahoma State Penitentiary in 2003 asking that the warden transfer Reese to another Oklahoma penal institution. Defense Exhibit #1; TE 13 127. After establishing the existence of the letter, the prosecution elicited from Reese his reason for wanting the transfer was St. Clair's brother was an inmate at his current institution. Id. at 128. Upon defense counsel's objection, the prosecution argued their reason for introducing this inflammatory and irrelevant evidence that suggested St. Clair's brother was a danger to Reese was to again bolster his testimony, "[b]ecause we are trying to show that this man has absolutely nothing to gain from his testimony." Id. at 129.

Disregarding the fact they introduced the letter and made it an issue, the Commonwealth argued Reese's motive for seeking the transfer was admissible and not informing the jury of his reasons for wanting the transfer would be misleading.[7] Id. at 130. Defense counsel responded it was unfair for the Commonwealth to introduce the letter and then claim the Rules of Evidence needed to be bent in allowing them to explain the motivation for the letter when that stated motivation was prejudicial to St. Clair. Id. at 133. Although the trial court did sustain the objection, the curative admonition given did not "unring the bell." Id. at 136.

Later during Reese's testimony, the Commonwealth elicited that St. Clair had threatened to kill a man who was dating his ex-wife. TE 14 218. Counsel objected and moved for a mistrial, stating that despite the fact the case had already gone to trial twice

[7] At a pre-trial hearing, defense counsel moved to disqualify the two prosecutors who sent the letter to the warden because they could be possible witnesses should Reese be less than honest during cross-examination as to his motivations for testifying. That motion was denied. TH 8/10/05 57-61.

and Reese had testified both times, this evidence had never been offered before and was prejudicial. The court overruled the motion for mistrial. Id. at 221. The court did admonish the jury. Id. at 222.

Reese also told the jury he did nothing to save Mr. Brady from being shot by St. Clair because his life would have been in danger had he done so. Id. at 239. Counsel objected and argued this was, yet again, completely new testimony that had never been offered at the two previous trials and was a calculated attempt to color St. Clair as violent. Id. Counsel asked for a mistrial, which was denied as the court opined the jury had already discerned St. Clair was a violent person and this additional irrelevant and inadmissible evidence was not individually prejudicial. Id. at 241.

In an attempt to humanize Reese and to bolster his shaky credibility, the prosecution elicited his motivation for testifying. TE 13 143. Defense counsel objected, but was overruled. Id. Reese testified he was testifying so that Mr. Brady's family and the family of Tim Keeling who was killed in Texas would know what had happened to their loved ones. Id.

Reese also told the jury after he and St. Clair separated and were individually on the run, he feared for the safety of his family as St. Clair was still on the loose. TE 14 258. During cross-examination, counsel asked Reese why he never tried to "escape" from St. Clair's "control" during the trek from Oklahoma through Texas, Louisiana, Indiana and Kentucky. TE 15 36. Reese responded, "I don't think I'm allowed to answer that." Id. At a bench conference, the prosecution informed the court he had told Reese not to state he was afraid for the safety of his family as he believed St. Clair or his family

might attempt to harm them. Id. at 37. The court instructed Reese to answer the question and he told the jury, that he "was afraid for his family." Id. at 53.

Reese was the only witness who could provide testimony as to who shot and killed Mr. Brady. It is quite likely the jury delivered a death verdict only because they were told by Reese that St. Clair was the shooter and he was a scared accomplice. The Commonwealth realized it was essential Reese's shaky credibility be bulked up as much as possible and the trial court's rulings were very complementary to this purpose. Only by bolstering his credibility could the Commonwealth hope the jury would disregard their witness' obvious credibility problems. Well played.

KRE 608, Evidence of Character, dictates that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion of reputation...." The rule does not allow for bolstering a witness' credibility with self-serving statements from the witness that he has met and talked with the prosecutor about his testimony, and the prosecutor instructed him to say "just the truth," and that no one from the Commonwealth had instructed him what to say and that he is testifying "so the truth will be known" to the victim's family. Reese's testimony that he was told to tell the truth by the prosecutors and was doing that so Mr. Brady's family would "know the truth" served only to bolster his credibility and was not relevant to any matter before the jury.

Further, the testimony of Reese contained unfairly prejudicial KRE 404(b) testimony and the trial court failed to engage in a proper analysis of whether the inherent prejudice of the testimony was outweighed by its probative value.

The inadmissible portions of Reese's testimony were not more probative than prejudicial. The fact Reese wanted to be transferred because he was afraid of St. Clair's

brother is not relevant to the questions before the jury. His allegation St. Clair threatened to kill a man who was dating his ex-wife is not relevant to any matter before the jury and was offered solely to ensure the jury had the worst possible opinion of St. Clair. Identity was not at issue, opportunity was not at issue, intent was not at issue. There was simply no relevant reason for the admission of the testimony, other than to color the minds of the jurors. The trial court simply failed to engage in a proper analysis of whether the probative value, if any, of the evidence was outweighed by its prejudicial effect. Norris v. Commonwealth 89 S.W.3d 411 (Ky. 2002). "To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition; sufficiently probative to warrant introduction; and the probative value must outweigh the potential for undue prejudice to the accused." Chumbler v. Commonwealth, 905 S.W.2d 488, 494 (Ky. 1995), citing Clark v. Commonwealth, 833 S.W.2d 793, 795 (Ky. 1990). *See also*, Holland v. Commonwealth, 703 S.W.2d 876 (Ky. 1985).

The admission of the above-mentioned testimony was not harmless beyond a reasonable doubt. Chapman v. Calif., 386 U.S. 18, 24 (1967). Reese was the only witness who testified St. Clair shot Mr. Brady. His testimony was self-serving and "inherently unreliable." Lee v. Illinois, 476 U.S. 530, 546 (1986). The prosecutor's improper vouching for the coindictee and only ear witness could have affected the jury's sentencing verdict. Neeley v. Commonwealth, 591 S.W.2d 366, 368 (Ky. 1979). 5th, 6th, 14th Amends. US Const., §§ 2, 3, 10, 14 KY. Const. Reversal is required.

**13. Improper Direct Of Det. Melton To Bolster Reese.**

Preserved. TE 17 51. Former police officer Rick Melton's testimony indicated his initial involvement in the case was limited to processing and lifting prints from Mr. Brady's truck. TE 17 44-48. Melton testified Officer John Carr was the original case officer on the investigation. Id. 49. After Carr's retirement, Melton became the case officer. (Id. 50) The following colloquy occurred during Melton's direct examination:

> CA: Detective Melton, you have sat here at the table with us all through this proceeding that is going on right now, and you have heard all of the testimony. You, in particular, have heard the testimony of Dennis Reese, haven't you?
>
> RM: Yes, sir.
>
> CA: Detective Melton, you have had occasion, haven't you, to even view a sketch that Dennis Reese made regarding the area involved around the truck stop and the 015 Food Mart?
>
> RM: Yes, sir.
>
> CA: Okay. Now, in considering both that sketch, and the descriptions, **and accounts that you have heard from Dennis Reese when he testified here,** do you have any reason to disagree with the accuracy or the completeness of what he said about how things were situated?
>
> RM: He was accurate...TE 17 51.

Defense counsel objected, arguing the prosecutor's question was vague and Melton's answer could be misconstrued to mean that Melton thought Reese's entire version of the events was accurate. The prosecutor volunteered to rephrase his question. The prosecutor then stated to Melton, "Let me rephrase my question a little bit, Detective. When I am talking about how Dennis Reese had things situated, I am talking about his description of the layout, where they were. Okay?" TE 17 53. This in no way cleared up the misconception.

Dennis Reese was co-indicted with St. Clair. Reese pled guilty to complicity to murder and kidnapping, among other offenses. TE 13 120. Reese testified that he had participated in the killing and kidnapping of Mr. Brady. TE 13 122. Reese told the jury that he had not acted alone in the murder of Mr. Brady and identified St. Clair as the shooter and instigator of all the offenses against Mr. Brady.

"Generally, a witness may not vouch for the truthfulness of another witness." Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997) citing Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993); Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992). This is because such testimony "remove[s] the jury from its historic function of assessing credibility." Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1996). Our system of justice "entrust[s] to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between conflicting versions of events and arrive at a proper verdict." Id. at 696.

It is just as improper for a witness to vouch for the credibility of out-of-court statements of another, as it is for another witness' testimony at trial. Hall, supra at 323. Vouching for the truth of such statements is impermissible. Hellstrom, supra at 614. To arrive at a recommendation of death, it was necessary for the jury to believe Reese and disbelieve St. Clair. As such, the jury was required to determine the credibility of all fact witnesses. This process was "flawed" when Melton was permitted to bolster Reese's testimony. Bussey v. Commonwealth, 797 S.W.2d 483 (Ky. 1990). The prosecutor did not clear up the distinct impression left with the jurors that Melton was vouching for the accuracy of Reese's version of events. The Commonwealth cannot prove the admission of this was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18

(1967). St. Clair was denied a fair trial and due process. §§ 2, 7, 11, Ky. Const., 14th Amend. U.S. Const. Reversal is required.

**14. Prosecution Violated KRS 504.070(4) Notice Requirement.**

Preserved TE 13 52-53. TH 7/18/05 8. The prosecution repeatedly inquired whether the defense intended to put on a "mental defense:"

> "[I] don't know whether they're going to put on a mental defense like they did in Hardin County or not and they don't have to tell me...My point though is that I know there is a twenty day notice rule and I would hope at least that would be observed. And in that same vein I would ask that the Court put some kind of reasonable time limit on when motions can be filed so we don't have a deluge of motions coming in on the virtual eve of the trial." TH 06/15/05 24.
>
> "Judge, we had requested - - I don't have a written motion to tender to the Court today - - but we had requested more than twenty (20) days notice if the Defense were intending to raise a mental defense and I just wanted to put that on the record...There has been no notice filed yet. The Rule requires twenty (20) days." TH 07/18/05 7-8.

Defense filed timely notice pursuant to KRS 504.070(1) that St. Clair intended to introduce expert testimony relating to his mental disease. TR 2 242. During a bench conference in the middle of the Commonwealth's opening statement, the prosecution essentially informed trial court and defense counsel that Dr. Candace Walker would be testifying in rebuttal. TE 13 52. Defense counsel objected as they had not received any notice of a mental health rebuttal witness pursuant to KRS 504.070. The prosecution argued the defense had actual notice of the prosecution's intent to call Dr. Walker even if they did not have "technical" notice. TE 13 53.

KRS 504.070(4) provides, "No less than ten (10) days before trial, the prosecution shall file the names and addresses of witnesses it proposes to offer in rebuttal along with

reports prepared by its witnesses." The statute requires the prosecution to give notice of its rebuttal mental health witnesses ***at least*** 10 days before trial. The use of the word "shall" means that the statute is mandatory. KRS 446.010(29). Neither the prosecution nor the trial court have any discretion to ignore the requirements of the statute. In Stanford v. Commonwealth, 793 S.W.2d 112 (Ky. 1990), the defendant failed to give notice of his intent to introduce mental health evidence 20 days before trial as required by KRS 504.070(1), and the trial court refused to allow him to introduce mental health evidence to support the mitigating factor of EED. The Commonwealth contended the defendant deliberately failed to give notice to avoid triggering the prosecution's right to have the defendant examined. The Court said, "Whatever his motivation, the notice was not filed. As such, the profered (sic) evidence was properly excluded by the trial court." Id., 793 S.W.2d at 115. If the defense is obliged to comply with the notice provisions of the statute under pains of having its evidence excluded, then so should compliance be obligatory on the prosecution. If anything, compliance ought to be more strictly enforced against the prosecution because the defendant has a constitutional right to have the individuals setting the sentence hear and consider mitigating evidence in his behalf. Lockett v. Ohio, 438 U.S. 586, 604 (1978). The prosecution does ***not*** have a corresponding constitutional right.

In Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002) this Court addressed the defendant's due process right to notice of the prosecution's expert witness' report pursuant to a statute that did not specifically require disclosure of the report. The Court reiterated the holding in Hyatt v. Commonwealth, 72 S.W.3d 528 (Ky. 2002) that, "the defendant's due process rights were violated at the risk assessment hearing because the

report arrived too late to provide him with notice of its contents, to allow counsel to read and consider it, and to allow sufficient time for preparation including the calling of expert witnesses, if any, to counter the conclusions of the report." Pendleton, supra, at 528. The Court held in Pendleton that the defendant's due process rights were violated where he was not provided the expert's report until the day before the risk assessment hearing. The Court stated, "Both the Fourteenth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution guarantee the right of a defendant to call witnesses on his behalf. While due process rights may be limited in certain proceedings, Appellant was entitled to notice of the report's contents in order to be able to present experts to testify during the risk assessment hearing." Id. As stated earlier, the statute in question in Pendleton, KRS 17.570 (repealed 2000), did not specifically require disclosure of the expert's report.

In the present case, the statute involved, KRS 504.070, specifically required the prosecution to give at least 10 days notice of the fact that they would be calling expert witnesses in rebuttal, to provide the names and addresses of those expert witnesses, and to provide reports prepared by its witnesses. That the prosecution verbally told defense counsel Dr. Walker was a possible witnesses does alleviate the notice requirement. The statute is clear that written notice is required. Even the trial judge told the prosecution in response to concerns about KRS 504.070, "Well, this is a Death Penalty case so everything you do, do it in writing. Okay?" TH 7/18/05 8. Furthermore, this was a trial where the defendant's life was at stake. Due process requires a written ten day notice that the prosecution will be calling an expert witness at a trial that will determine whether the defendant is going to be executed.

Michael St. Clair was certainly prejudiced when the prosecution was allowed to call Dr. Walker in rebuttal. Dr. Walker testified St. Clair had an Antisocial Personality Disorder and was also a psychopath. She testified about the lack of empathy and conscience in psychopaths with Antisocial Personality Disorder. TE 23 15-24. She described people with this diagnosis as violent, impulsive, manipulative, deceptive and disposed to domestic violence. TE 21 110, 117; TE 22 178. Dr. Walker emphasized the lack of effective treatment for such persons. TE 23 24-29. This testimony was obviously prejudicial to St. Clair in a penalty phase capital trial. Walker's opinion that St. Clair could not effectively be treated was inconsistent with Dr. Caruso's findings. TE 16 183-190. Reversal is required. § 2, 11, 17, KY Const.; 6th, 8th, 14th Amends., US Const.

**15. Improper Direct Examination Of Dr. Walker**

Partially preserved. TE 21, 22, 23. Dr. Walker was called by the Commonwealth in its case-in-rebuttal. TE 21, 22, 23. Dr. Walker testified St. Clair had long standing learning disorder and an overall IQ of 77. TE 21 65, 75. Dr. Walker described St. Clair's seizure disorder which caused abnormal brain waves. Id. 78. Dr. Walker testified St. Clair had an Antisocial Personality Disorder and was a psychopath. She testified about the lack of empathy and conscience in psychopaths with Antisocial Personality Disorder. TE 23 15-24. She described people with this diagnosis as violent, impulsive, manipulative, deceptive and disposed to domestic violence. TE 21 110, 117; TE 22 178. Dr. Walker emphasized the lack of effective treatment for such persons. TE 23 24-29. The errors in the direct-examination of Dr. Walker unduly prejudiced St. Clair and denied him due process of law and the right to present a defense. Reversal is required.

**Leading questions.** Preserved. TE 21 69, 92; TE 22 168; TE 23 16, 29. Throughout Dr. Walker's direct examination, the prosecution repeatedly and blatantly asked leading questions. The prosecution asked leading questions about St. Clair's scores on his IQ testing (TE 21 69), Dr. Caruso's testimony (TE 21 92), St. Clair's ability to plan a crime and to acquire tools for committing a crime (TE 22 168), his lack of conscience (TE 23 15), the ineffectiveness of antipsychotic drugs on psychopathy (TE 23 24), and the lack of effective treatment for psychopaths (TE 23 29).

Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony. KRE 611. "It is well known that a leading question propounded to a witness may, by creating an inference in his mind, cause him to testify in accordance with the suggestion conveyed by the question, making his answer rather an echo to the question than a general recollection of events." Blankenship v. Commonwealth, 234 Ky. 531, 28 S.W.2d 774 (Ky. App. 1930.) See also Holt v. Commonwealth, 219 S.W.3d 731, 739 (Ky. 2007).

In United States v. Bryant, 461 F.2d 912 (6th Cir.1972,) the court held a showing of hostility was a prerequisite to the utilization of leading questions on direct examination of a witness except with respect to preliminary and uncontroverted matters.

None of the exceptions to the rule against asking leading questions in direct examination found in KRE 611(c) are applicable here, nor were they argued at trial. The leading questions only served to unfairly bolster Dr. Walker's credibility. The prosecutor's persistent and unrelenting leading of Dr. Walker deprived St. Clair of a fair trial.

Appellant is cognizant that the defense counsel did not request an admonition to the jury to disregard the leading questions. That said, cumulatively, the prosecutor's leading questions did deprive St. Clair of a fair trial. The trial court should have taken steps to stop the persistent leading, even to the point of declaring a mistrial. Not only was KRE 611 violated, but also St. Clair's rights under the Confrontation and Due Process Clauses of the US and KY Constitutions. Reversal is required.

**Repetitive, Bolstering Testimony-** Preserved. TE 21 114. After Dr. Walker had explained St. Clair's Antisocial Personality Disorder traits over and over and over again, the trial judge called counsel to the bench:

> Judge: It appears to the Court that this witness is repeating the same stuff over, and over, and over again. I don't know whether you can - - it's kind of like Pandora's box - - I don't know whether you can get her to get to the point, or not, of where you are going.
>
> Commonwealth: I will try to direct her a little more. I have tried to back away from leading her.
>
> Judge: Well, I know at least five or six different times she's explained to us the traits of an Antisocial Personality.

Dr. Walker testified, and then repeated, and then repeated again virtually every area of her testimony. She talked about Antisocial Personality Disorder and Psychopathy *ad nauseum*. Even the judge asked "[I]s there any end in sight with this witness?" TE 23 16. The Commonwealth's reasoning: "Judge, some of this information is difficult to absorb on the first hearing." Id. There is no Rule of Evidence or case holding which supports repeating testimony simply because a prosecutor believes that it is difficult to understand. The Commonwealth's repetitive questions improperly bolstered Dr. Walker's credibility. The Commonwealth cannot prove this error was harmless beyond a

reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Reversal is required. 5th, 6th and 14th Amends., U.S. Const.; § 2, 7, and 11, Ky. Const.

**Lack of foundation for expert opinion**-Preserved. TE 21 122. The prosecution asked Dr. Walker if she had reviewed Dr. Caruso's (the defense's expert) curriculum vitae. Dr. Walker responded, "I heard it. You gave it to me over the phone but I didn't receive the written copy." TE 21 122. Over defense objection, Dr. Walker continued:

> From the Curriculum Vitae it sounded as if [Dr. Caruso] had no experience of the type that we have at KCPC. That he had not worked in the type of institution and had extensive patient experience as we do. It sounded more academic or evaluating people in different states and going from place to place to testify, he didn't have a sustained job like we think about at KCPC. Of course I have never met him. TE 21 124.

There was no way to know exactly what Dr. Walker was told "over the phone" about Dr. Caruso's background and CV. Dr. Walker was not qualified to offer an opinion on Dr. Caruso's background. There was no basis for Dr. Walker to have formed an opinion when she had not reviewed Dr. Caruso's CV. This testimony also resulted in bolstering Dr. Walker's testimony even further, due to her allusions that she was "more qualified" than Dr. Caruso to testify concerning these expert issues. The Commonwealth did not, and could not, lay a proper foundation in order for Dr. Walker to opine about Dr. Caruso's background. The Commonwealth cannot prove this error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Reversal is required. 5th, 6th and 14th Amends., U.S. Const.; Sec. 2, 7, and 11, Ky. Const.

**Lie Detector References.** Preserved. TE 22 160. Dr. Walker testified that St. Clair was a psychopath. She testified in great length about the traits of psychopaths. TE 21 150. During direct examination of Dr. Walker, the prosecution asked her if one of the physiological differences between normal people and psychopaths was the low galvanic

skin response. Dr Walker replied, "Oh, yeah. The galvanic skin response is the lie detector. It means that you sweat when you are lying because you are anxious and they do not..." At this point defense counsel objected. TE 22 159. Defense counsel pointed out this was the second time Dr. Walker had referenced a lie detector test. She had testified earlier that persons with Antisocial Personality Disorder don't get anxious like normal people, "[t]hey don't get fearful like normal people. They can pass a lie detector test because they don't sweat like normal people." TE 21 113.

No lie detector test was taken or offered to St. Clair during the history of this case. Dr. Walker's exhaustive testimony about the traits of psychopaths and her claim that they essentially can pass lie detector tests created the distinct impression that a lie detector test had been involved in this case.

St. Clair was substantially prejudiced and denied due process of law, a fair trial and reliable capital sentencing when the jury heard two references to psychopaths and lie detector tests. 5th, 6th, 8th & 14th Amends., U.S. Const.; § 2, 7, 11 & 17, KY. Const.

Polygraph evidence is inadmissible in Kentucky. Holland v. Commonwealth, Ky., 703 S.W.2d 876, 879 (1985). In Morgan v. Commonwealth, 809 S.W.2d 704, 705-707 (Ky. 1991), this Court reversed Morgan's murder conviction because a police officer, who was described as possessing special interrogation skills, gave testimony creating a clear inference Morgan had taken and failed a polygraph examination. Likewise, in the case at bar, Dr. Walker's testimony created a clear inference that a polygraph examination was involved in this case. In Phillips v. Commonwealth, 17 S.W.3d 870, 877 (Ky. 2000), this Court stated "prejudice associated with evidence that the [witness]...underwent a polygraph examination is the resulting inference that the

polygraph examination either confirmed or belied the truthfulness of the witness's testimony at trial." Id. In the case at bar, the Commonwealth cannot prove the two references to a lie detector test was harmless beyond a reasonable doubt. Chapman v. California, 87 S.Ct. 824, 828 (1967). The trial court's failure to grant a mistrial severely prejudiced St. Clair's substantial rights. Reversal and a new trial are required.

**Improper question.** Preserved. TE 21 149. The prosecutor questioned Dr. Walker about the fact that Dr. Caruso, the defense expert, had listed eight total diagnoses for St. Clair and Dr. Walker had only listed four total diagnoses for him. TE 21 147. The prosecution asked "Is there anything about listing separate diagnoses that would be significant for someone involved in a private practice?" Dr. Walker responded, "[Y]es, because that's how they get reimbursed...In private practice, it's largely based on what they're going to be paid..." Id. 149.

Defense objected, noting that when Dr. Caruso was on the stand the prosecution had not asked him any questions about whether or not he was getting paid extra for the number of diagnoses he listed. The line of questioning was irrelevant, misleading and unduly prejudicial, especially since Dr. Caruso was not billing his work to any insurance company.

The trial court erred to St. Clair's substantial prejudice and denied him due process of law and a fair trial when it allowed the prosecutor to introduce improper rebuttal testimony under the guise of impeachment. 5th, 6th, 8th, 14th Amends., U.S. Const.; § 2, 7, 11, 17, Ky. Const. In Sanborn v. Commonwealth, 754 S.W.2d 534, 548 (Ky. 1988), this Court, quoting from Jones on Evidence, Vol.4, Sec. 24.1 (6th ed. 1972), stated: "rebutting evidence means...evidence in denial of some affirmative fact which

the answering party has endeavored to prove." Walker's testimony regarding Dr. Caruso's list of diagnoses for insurance purposes did not meet the definition of proper rebuttal testimony. The Commonwealth cannot prove this error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

## 16. Trial Court Erred In Allowing Commonwealth To Call Certain Witnesses Live

Preserved. TH 8/10/05 108. Summaries of 26 witnesses were used in lieu of calling live witnesses at St. Clair's penalty phase trial. Over objection, the prosecution called Dennis Minton, Perry Unruh, Dr. Weakley-Jones and Detective Melton as live witnesses rather than reading their witness summaries. TH 8/10/05 108. St. Clair had submitted witness summaries on these four witnesses and the Commonwealth had submitted witness summaries on Unruh and Minton. In fact, both parties agreed on the witness summaries for Unruh and Minton. Id. 108-109. Regardless, the Commonwealth argued that it was entitled under Boone to call certain witnesses live if it so desired. The trial court overruled the motion and allowed the Commonwealth to call the aforementioned witnesses as live witnesses.

In Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992), this Court considered what matters might be pertinent for a punishment phase jury to consider in addition to those matters itemized in KRS 532.055(2):

> [W]e believe it would suffice, in most cases, for the jury to have read to it (a) the charges from the indictment of which the defendant was found guilty; (b) any charge of which the defendant was found guilty which was a lesser-included offense to a charge set out in the indictment; (c) the jury instructions given by the trial court at the guilt phase; and (d) the jury's verdict.

> In addition to the matters set out above, should both sides agree, each could read a concise summary of the evidence which it offered and which was admitted at the guilt phase of the earlier trial. Similarly, the closing arguments of both sides from the guilt phase could be read or projected if both agreed.
>
> In the event that the parties cannot agree as to the summaries of the evidence referred to above, then each could submit its proposed summary to the opposing party and the court, who could then determine what the summaries would contain after hearing any objections and argument from the opposing party.

Boone, supra.

Boone does not allow the Commonwealth to pick and choose between witness summaries and live testimony. It clearly states "in the event that the parties cannot agree as to the summaries of the evidence referred to above, then each could submit its proposed summary to the opposing party and the court, who could then **determine what the summaries would contain** after hearing any objections and argument from the opposing party." Boone, supra. Here, there was an agreement to the content contained in the witness summaries for Unruh and Minton. Notwithstanding the agreement, the trial court allowed the Commonwealth to call Unruh, Minton and two other witnesses live. This allowed the Commonwealth to highlight certain witnesses over others. Such "picking and choosing" type of behavior was not envisioned nor condoned by Boone. The trial court abused its discretion and denied St. Clair his right to due process. Reversal is required.

## 17. Refusal To Redact Improper KRE 404(b) References In Witness Summaries

Preserved. TH 8/10/05 80. TR 2 196. Prior to St. Clair's new penalty phase trial, defense counsel moved the trial court to exclude KRE 404(b) evidence from certain

witness summaries. TR 2 196. Specifically, defense counsel asked the trial court to exclude testimony about the escape, burglary and vehicle theft in Oklahoma; the kidnapping and vehicle theft in Colorado; the murder of Timothy Keeling in New Mexico and the shooting incident of Trooper Bennett in Elizabethtown (Hardin County) Kentucky. Id. Defense counsel objected to the inclusion of KRE 404(b) evidence in the following witness summaries tendered by the Commonwealth and read to the jury:

> **Herbert "Butch" Bennett-** This witness summary detailed the shooting at Trooper Bennett in Hardin County. TE 17 7-22.
> **John Carr-**Summary referenced the shooting at Trp. Bennett and references to crimes in Colorado, New Mexico, Oklahoma and Elizabethtown. TE 17 23-36.
> **Ronnie Crain-**Summary referenced the shooting at Trp. Bennett. TE 17 38-43.
> **Mark Haynes-**Summary referenced the shooting at Trp. Bennett. TE 17 60-64.
> **Calvin Hemphill-**Summary contained references to the New Mexico homicide of Timothy Keeling. TE 15 95-96
> **James Montoya-**Summary contained references to the New Mexico homicide of Timothy Keeling. TE 15 92-94

In its Opinion affirming St. Clair's conviction, this Court upheld the trial court's ruling admitting the KRE 404(b) evidence on the ground it was relevant to prove St. Clair's identity as the perpetrator of the crime charged. Specifically, this Court stated the KRE 404(b) evidence "(1) proved how Appellant came into possession of the murder weapon: (2) demonstrated a motive for his abduction of Brady by illustrating Appellant's penchant for late-model small pickup trucks; (3) linked the items found in Brady's abandoned truck to Appellant; and (4) suggested similarities between the execution-style killings of Keeling in New Mexico and Brady in Kentucky that created a reasonable inference that Appellant had committed both murders." St. Clair v. Commonwealth, 140 S.W.3d 510, 536-37 (Ky. 2004)

This Court affirmed St. Clair's conviction, but remanded the matter for resentencing. As such, in this new penalty phase trial, the identity of the perpetrator was

not at issue in that the previous jury's conviction of St. Clair for the murder of Francis Brady was affirmed. "Identity," "modus operandi," or "motive" evidence was therefore not admissible because the identity of St. Clair as the perpetrator was not in dispute. See Bell v. Commonwealth, 404 S.W.2d 462 (Ky. 1966); Arnett v. Commonwealth, 470 S.W.2d 834 (Ky. 1971); Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990) ("the court should require the Commonwealth to establish a proper basis for admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect." Id. at 381). At St. Clair's new penalty phase trial, all that remained was for the new jury to determine whether an aggravating factor had been proven beyond a reasonable doubt and, if so, which punishment of the available range was appropriate to impose.

The jury was told from the very beginning that St. Clair was convicted of killing Francis Brady. As defense counsel pointed out to the trial court:

> "It's not in dispute whether [St. Clair] was here in Kentucky. It's not in dispute whether he was in the vehicle with Francis Brady when it went up the hill in Bullitt County. We can't relitigate that. And so there's no longer a need to say well, it must have been him because it was done similarly to what was done in New Mexico. And it must have been him because he had the gun that was stolen in Oklahoma. And it must have been him because he was identified by Trooper Bennett. That's not before this jury anymore. That's already been ruled on. That's already been found by the jury. That's already been affirmed by the Supreme Court. Identity and motive are no longer an issue here." TH 8/10/05 83.

"[E]vidence of other crimes is not relevant for a proper purpose unless the fact it is offered to prove is truly in dispute." Lawson, The Kentucky Evidence Law Handbook, § 2.25 (II) (3rd Ed. 1993). The improper KRE 404(b) evidence contained in the witness summaries denied Michael St. Clair due process, and reliable determination of his

sentences in violation of §§ 2, 7, 10, 11 and 17, Ky. Const., and 5th, 6th, 8th, and 14th Amends. U.S. Const. Accordingly, this Court must reverse.

**18. Improper Introduction Of Inflammatory Autopsy Photographs.**

This issue is preserved. (TE 17, 151-154). During Commonwealth witness Dr. Barbara Weakley-Jones' testimony, the prosecution asked to approach and the parties discussed that the issue of the autopsy photographs had been raised in St. Clair's prior appeal and that this Court had overruled the objection. Id. Through Dr. Weakley-Jones, the prosecution introduced the photographs and displayed them to the jury. Id.

The autopsy photographs were not relevant for any purpose other than to inflame the jury and ensure a sentence of death. They were not relevant evidence of any point in controversy. They were not probative to the question of whether the aggravator had been adequately proven—therefore their only purpose was to secure a death verdict.

Indeed, as the defense argued, *no* photographs should have been shown to the jury because of the use of the witness statements—the manner of death of Mr. Brady was established via Det. John Carr, Dr. Weakley-Jones and Dennis Reese. (TR III, 326). None of the photographs were relevant for sentencing.

It is not true or necessary that "a resentencing jury is entitled to hear everything that was introduced during the guilt phase of the trial. Evidence presented by the State during the penalty phase must be relevant to an issue properly being considered during that phase, such as an aggravating circumstance." Farina v. State, 801 So.2d 44, 50 -51 (Fla. 2001); See also Kormondy v. State, 703 So.2d 454, 463 (Fla.1997):

> "The jury is charged with formulating a recommendation as to whether Kormondy should live or die. Testimony that Kormondy

said he would kill again, when that testimony is not directly related to proving a statutory aggravating circumstance, is outside of the scope of evidence properly presented by the State during the penalty phase. We find that this evidence in this instance constitutes impermissible nonstatutory aggravation. For this evidence to be admissible at the penalty-phase proceeding, it has to be directly related to a specific statutory aggravating factor. Otherwise, our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute.

Kormondy v. State, 703 So.2d 454, 463 (Fla., 1997)

This Court has repeatedly held it to be reversible error to allow the introduction of lurid photographs likely to arouse the passions of the jury and have little or no probative value. Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984). Even if the photographs had a slight value for the penalty phase re-trial this was far outweighed by the inflammatory nature of the photographs. Id. at 676.

This Court has stated that even gruesome autopsy photographs may be admissible. However, when this Court has so stated, it has been because the photographs were relevant to an element the jury was charged with finding. "Because the Commonwealth must prove the *corpus delicti,* photographs that are probative of the nature of the injuries inflicted are not excluded unless they are so inflammatory that their probative value is substantially outweighed by their prejudicial effect." Adkins v. Commonwealth, 96 S.W.3d 779, 794 (Ky. 2003). "The state cannot be precluded from proving the commission of a crime that is by its nature heinous and repulsive." Epperson v. Commonwealth, 809 S.W.2d 835, 843 (Ky. 1990). "Appellant did not dispute that he killed Roberts, but he did dispute that he intended to kill her. The four photographs and the videotape each demonstrated to a different extent Appellant's attempts to conceal his

crime by placing Roberts's body in a remote location, partially burning it, and covering the remains with plywood and tarpaulins. This evidence of attempted concealment of the crime tended to belie any claim that no crime occurred." Ernst v. Commonwealth, 160 S.W.3d 744, 757 (Ky. 2005). In all of these cases where this Court ruled gruesome photographs as more probative than prejudicial, the photographs were relevant to the question presented to the jury. The difference here is the photographs were not relevant to the question before the jury: "Did the Commonwealth prove the aggravator?"

In fact, this Court cited in its Opinion in St. Clair's appeal of his conviction the trial court's finding. "The trial court specifically found that "the photographs in question ... will assist the jury in making a determination as to the cause of death in this case" and thus concluded that "the probative value of this evidence outweighs any possible prejudice to the defendant." St. Clair v. Commonwealth, 140 S.W.3d 510, 552 (Ky. 2004). If the photographs were admissible, even gruesome, during the guilt phase because they were relevant to the cause of death, they cannot be admissible now as they were not relevant to the question of whether this murder was committed by a person with a record of conviction for a capital offense.

In Poe v. Commonwealth, 301 S.W.2d 900, 902-03 (Ky. 1957)(emphasis added), this Court stated:

> The introduction of gruesome photographs, bloody clothing, and the like is almost inevitably accompanied by the risk of inflaming the minds of the jurors to the prejudice of the accused. Where necessary to prove a **contested relevant fact,** their probative value is usually held to outweigh any possible prejudicial effect they might have. **But when the facts sought to be proved by the possibly prejudicial evidence are admitted by the defense it is difficult to understand what probative value (other than as cumulative evidence) such evidence might have.**

The present case is similar to Poe in that the facts proven by the photographs are not at issue—this jury were not charged with determining St. Clair's guilt. The question posed to this jury was whether this was a death-eligible case and, if so, what sentence was appropriate. By allowing the jury to view the autopsy photos, irrelevant and prejudicial evidence, the trial court secured a death sentence for St. Clair.

In Holland v. Commonwealth, 703 S.W.2d 876 (Ky. 1986), this Court reversed due to the introduction of a gruesome color photograph of the deceased because it went "beyond demonstrating proof of a contested relevant fact." Id. at 879. In that case, as here, all necessary facts were established by the testimony of witnesses without the need for photography. Id.; See also Clark v. Commonwealth, 833 S.W.2d 793, 794-95 (Ky. 1992); Funk v. Commonwealth, 842 S.W.2d 476, 479 (Ky. 1993); Frick v. Commonwealth, 230 S.W.2d 634 (Ky. 1950). At St. Clair's re-sentencing, the photographs depicted no contested facts and merely inflamed the jury.

In Craft v. Commonwealth, 229 S.W.2d 465 (Ky. 1950), and in the companion case of Shelkles v. Commonwealth, 229 S.W.2d 470 (Ky. 1950), this Court reversed because of the introduction of a photograph of the victim killed with a blast from a shotgun. Those cases held the photograph was "irrelevant and unnecessary" because of other proof. Craft, supra. at 466.

Certainly the repetitive nature of the photographs was objectionable. They not only repeated the narrative, they repeated each other. In Morris v. Commonwealth, 766 S.W.2d 58, 61 (Ky. 1989), this Court held the prosecution should not be allowed to "overwhelm the jury with repetitive photographs." The jury here was shown multiple gruesome autopsy photographs. Even if the photographs had some slight value, the

prejudice of the photographs far outweighed their worth and that prejudice was compounded by repetition. Even if evidence is admissible, it can be "presented in such a way as to cause undue prejudice." Funk, supra at 481.

The introduction of irrelevant, repetitive, gruesome and inherently inflammatory autopsy photographs, denied Michael St. Clair due process and a reliable determination of his sentence. 5th, 6th, 8th, 14th Amends., US Const.; and §§ 2, 7, 11, 17 KY Const. This Court must reverse for a new penalty trial.

**19. Failure Of The Trial Judge To Recuse Himself**

Preserved. TR 1, 135-138; TR 2 153-154; TH 4/11/05 4-5. In St. Clair's 1998 trial, the jury had returned a verdict recommending a sentence of death. In chambers, St. Clair indicated he did not want any evidence presented on his behalf in the penalty phase. TR 1 135-138; TH 4/11/05, 4-5. Once the jury returned its death verdict, the trial court excused the jury and immediately called St. Clair before the bench and imposed final sentence. Id. 5. Defense counsel objected, arguing St. Clair was entitled to an additional hearing before the trial court imposed sentence because it was the trial court, not the jury, which made the final determination as to what sentence to impose. The trial court's procedure was improper under the scheme of KRS 532.025 in that it deprived St. Clair of the right to an independent sentencing proceeding at which the trial court could hear evidence and argument, and exercise its own discretion as to the proper sentence to impose. In that context, the trial court expressed an opinion as to the ultimate issue in St. Clair's case. It is not relevant that the trial judge permitted the defense to present evidence and argument in support of a sentence other than death at the resentencing

because the trial court had, in essence, already expressed an opinion as to the sentence it would impose.

In addition, there were other grounds for recusal which must be considered both separately and cumulatively. St. Clair, acting *pro se*, filed a complaint against the trial court with the Judicial Conduct Commission in October 2004. The Commission determined there was no evidence of any misconduct or violation of the Code of Judicial Conduct, and took no action on the complaint. TR 1, 145. Additionally, St. Clair, again acting *pro se*, filed a motion to recuse the trial judge in September 2004 accusing the trial judge of personal misconduct in the process of the first trial. Although St. Clair's trial counsel prevailed upon him to withdraw the grounds asserted therein, the fact such motion was made and heard publicly cannot be discounted. TH 1/10/05 3; TR 1 144.

All defendants are entitled to a fair trial and due process of law. Ky. Const. §§ 2 and 11; U.S. Const. Amends. 5, 6, and 14. The essence of our criminal justice system is a fair hearing and a fair tribunal. In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955). "Trial before an unbiased judge is essential to due process." Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (citations omitted). "A criminal defendant in a state prosecution is constitutionally entitled to a neutral and detached judge in the first instance." Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972). "[I]t is a universally recognized tradition of the law that the appearance of impartiality is next in importance only to the fact itself. It cannot be sacrificed to convenience." Wells v. Walton, 501 S.W.2d 259, 260 (Ky. 1973). As the Supreme Court stated in In re Murchison, supra at136:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent ***even the probability of unfairness***. ... Such a stringent rule ***may sometimes bar***

> ***trial by judges who have no actual bias*** and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14.

(Emphasis added).

In Summers v. Commonwealth, 843 S.W.2d 879, 882 (Ky.1982), this Court confirmed that disqualification is dictated when the impartiality of a judge "might reasonably be questioned." Whenever there is "such a likelihood of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused," the judge must be recused. Taylor v. Hayes, 418 U.S. 488, 501 (1974), *citing* Ungar v. Sarafite, 376 U.S. 575, 588 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, 'but due process requires no less.'" Taylor, supra at 501, *citing* In re Murchison, supra. See also KRS 26A.015.

While it is true "[t]he burden of proof required for recusal of a trial judge is an onerous one," Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001), the burden has been met in the instant case. "There must be a showing of facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.'" Stopher at 794, *quoting* Foster v. Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961), *cert. denied* 368 U.S. 993 (1962). Every litigant is "entitled to nothing less than the cold neutrality of an impartial judge, and the law maintains that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent." Commonwealth v. Murphy, 174 S.W.2d 681, 685 (Ky. 1943); *quoting* 30 Am Jur. Judges §53.

The trial judge was required to recuse himself because of his expressed opinion concerning the merits of the proceeding and because of the pro se motions and judicial complaints accusing him of personal misconduct. His failure to do so violated St. Clair's constitutional right to an unbiased decision-maker. §§2, 7 and 11, Ky. Const.; 6th 8th, and 14th Amends., U.S. Const. Reversal is required.

**20. Improper Limits Placed On Individual Voir Dire.**

Preserved. Counsel asked whether questions concerning the jurors' opinions on the death penalty would be allowed. TE 2 3. The trial court stated it would not allow such questions. During individual voir dire of Hines, the prosecution objected to counsel's question concerning mitigation and whether Hines would require mitigation to be directly related to the crime or would accept and consider more general mitigation. TE 3 208-209. The trial court sustained the objection, holding counsel could only ask if the prospective juror would follow the court's instructions. TE 3 211-212.

Botos expressed reservations about imposing the minimum penalty or some term of years and defense counsel endeavored to explore her reservations, but was stopped by objection of the Commonwealth. TE 5, 145. Wagner told the parties she had given a lot of thought to the question of the death penalty and counsel expressed a desire to explore her feelings on the death penalty, but was forestalled by the trial court. TE 2 69-72.

During individual voir dire of Massey, counsel attempted to question her concerning her statement that "normally a murder trial you think of, you know, the maximum penalty that you can think of..." TE 4 361-362. Counsel attempted to discern whether she would be able to consider both the minimum and maximum sentence, but

was estopped by prosecution objection. TE 4, 361. The court sustained the motion. TE 4 363.

In order to secure a fair and impartial jury, a defendant's right to question prospective jurors as to the biases and prejudices cannot be abridged. The right to an impartial jury is basic to our system of justice. Duncan v. Louisiana, 391 U.S. 145 (1968). The "right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." Ham v. South Carolina, 409 U.S. 524 (1973) (Marshall, J., concurring).

Pointer v. United States, 151 U.S. 396, 408 (1894), found the right to intelligent exercise of challenges is "one of the most important of the rights secured to the accused." The Court stated,

> Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

Id. at 408-409.

In Morgan v. Illinois, 504 U.S. 719, 729-730 (1992) the Court restated this principle: "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." "Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182,

188 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

A fair jury cannot be formed in a vacuum. That point was made in United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973). "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. It follows, then, that a requested question should be asked if an anticipated response would afford the basis of a challenge for cause." Clearly, counsel's questions here would have prompted answers that would have provided for the bases for challenges for cause as they would have fleshed out the opinions of the jurors more completely and fully and allowed also for the more intelligent use of peremptory strikes.

"The purpose of voir dire is to determine whether a juror possesses necessary qualifications, whether he has prejudged the case, and whether his mind is free from prejudice or bias so as to enable a party to ascertain whether a cause for challenge exists, and to ascertain whether it is expedient to exercise the right of peremptory challenge." Sizemore v. Commonwealth, 306 S.W.2d 832, 834 (Ky. 1957). This implies an inquiry sufficient to ascertain whether a challenge for cause exists with regard to members of the jury venire.

Indeed, this Court said in Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky.1991), "A meaningful voir dire examination by both sides is a sine qua non to the seating of a fair and impartial jury." "A wide latitude is allowed counsel in examining jurors on their voir dire." Webb v. Commonwealth, 314 S.W.2d 543, 545 (Ky. 1958).

United States v. Johnson, 584 F.2d 148, 155 (6th Cir. 1978), held it is reversible error if, by unduly restricting voir dire, the peremptory challenge right is substantially impaired. Furthermore, an error in refusing to allow a proper question that could have formed the basis for a challenge for cause is not subject to harmless error analysis. United States v. Blount, supra, 479 F.2d at 651. See also, United States v. Hill, 738 F.2d 152 (6th Cir. 1984).

Further, St. Clair had a statutory right to voir dire the jurors individually regarding mitigation. KRS 532.025 (2) provides "in all cases of offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances... otherwise authorized by law and any of the following statutory...mitigating circumstances which may be supported by the evidence." As a matter of due process under both the state and federal constitution, a juror in Kentucky must be able to follow the law. KRS 532.025 is clear and unambiguous. Mitigation by definition is a reason to give a lesser punishment. By statute, a juror must be able to consider the statutory and non-statutory mitigation offered by the defendant, and consider it a reason to give a lesser punishment. Therefore, a defendant is entitled to question prospective jurors concerning their consideration of mitigation evidence.

It has long been recognized "in capital cases the fundamental respect for humanity underlying the Eighth amendment...requires consideration of the **character and record of the individual offender** and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." Woodson v. North Carolina, 428 U.S. 280 (1980)(emphasis added). In the instant case,

the trial court prohibited counsel from questioning Hines about whether he would consider mitigation about St. Clair's background and upbringing, or whether he would require that mitigation be directly related only to the crime.

Eddings v. Oklahoma, 455 U.S. 104 (1982), held in addition to not being precluded from considering as mitigation any aspect of the defendant's character, the sentencer also may not refuse to consider any relevant mitigation offered by the defendant. At the time Eddings was sentenced to death, the Oklahoma death penalty statute provided that in the sentencing proceeding "evidence may be presented as to any mitigating circumstances." In mitigation, Eddings presented substantial evidence of a "troubled upbringing" just as in St. Clair's case.

The only way to determine a juror's view on specific mitigation is to ask them. Counsel wanted to inquire of jurors whether or not they would consider all mitigation as having the same value. Under Eddings, if any of these jurors said they would not, they would have been excluded for cause based on their inability to consider the mitigating offered by the defendant. Therefore, it was clear error to prevent counsel from asking jurors about their opinions on mitigation.

The limitations placed upon defense counsel during the individual voir dire with regard to non-statutory mitigation denied St. Clair his constitutional right to a fair and impartial jury and his right to an adequate voir dire so he could exercise his peremptory challenges and make challenges for cause in a meaningful and intelligent way. KY Const., §§ 2, 3, 7, 11, 17; US Const. 5th, 6th, 8th, 14th Amends. Reversal is required.

## 21. Inadequate Hearing On Pro Se Request For Substitution Of Counsel

Preserved. TR 3 371; TH 8/10/05 6. Approximately one week before trial, St. Clair advised the trial court of problems he had encountered in his relationship with defense counsel and requested both defense attorneys be released from the case. TR 3 370.

As grounds for his motion, St. Clair stated he had to take it upon himself to file numerous *pro se* motions against the prosecutors because of prosecutorial misconduct. He alleged defense counsel Mirkin had only been to see him in prison twice; Mirkin had a block on his phone preventing St. Clair from communicating with him; Mirkin had only written one or two letters to him in prison; St. Clair had not been receiving copies of the pleadings and was told on one occasion he could just read the pleadings at the hearing. TR 3 371. St. Clair alleged his defense counsel had made a "secret deal" not to call a witness in exchange for the Commonwealth not calling Scott Kincaid. According to St. Clair, his counsel had also requested he not file any additional complaints against the prosecutors, and encouraged him to consider an LWOP sentence. Finally, St. Clair explained defense counsel Gibson had become upset with him during a phone conversation about the mitigation expert. Id.

In response, Mirkin confirmed he had only been to see St. Clair twice since the case was assigned for re-sentencing. TH 8/15/05 33. Mirkin noted he did get to see St. Clair every time he had been transported to the Bullitt County Jail and that co-counsel Gibson had been to see him in prison more often. Mirkin denied any knowledge of a block on his phone and stated he had never declined a collect call from St. Clair. Id. 34. Mirkin also confirmed that he had not sent St. Clair very many letters as co-counsel was

in communication with St. Clair much more than Mirkin. Mirkin stated he believed counsel had been sending St. Clair copies of the pleadings, but if they hadn't, it was defense counsels' fault. Co-counsel Gibson stated he had been to see St. Clair approximately six times since the case had been assigned for re-sentencing. Id. 38.

Defense counsel declined to address the "secret deal" between the defense and the Commonwealth. St. Clair's concerns about having to file pro se motions, complaints against the prosecutors, discussions of the LWOP sentence, and Gibson's temperament regarding the mitigation expert inquiry went unaddressed. Id. The trial court overruled the motion. Id. 40. When St. Clair asked if he could say something else, the trial court said, "no." Id.

Prior to the filing of the Motion to Release there had been obvious signs of a damaged attorney-client relationship. Specifically, St. Clair filed a Motion to Recuse the trial judge and defense counsel explicitly disavowed St. Clair's reasons on the record. TH 1/10/05 3. Also, defense counsel repeatedly asked the trial court to stop docketing St. Clair's pro se motions. TH 1/10/05 5. On one occasion, defense counsel specifically told the court to let St. Clair argue the motion, as it was his motion, not defense counsels'. TE 1 33.

While it appeared there had been a complete breakdown in communications between St. Clair and counsel, the trial court failed to conduct a meaningful hearing regarding all of St. Clair's disagreements with counsel and overruled the motion. Although the trial court asked defense counsel to respond to some of the allegations, the trial court simply ignored five of St. Clair's reasons/allegations.

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his

> client...Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent."

Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948). "[I]t is well settled that when a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction." Wilson v. Mintzes, 733 F.2d 424, 428 (6th Cir. 1984), vacating and remanding in light of Strickland v. Washington, 466 U.S. 669 (1984), adhered to on remand, 761 F.2d 275 (6th Cir. 1985). This is so even when the complaint is raised shortly before trial. See Wilson, supra. A "perfunctory, surface inquiry" is insufficient. Id. at 428; see United States v. Welty, 674 F.2d 185, 187 (3rd Cir. 1982).

"When serious allegations are made by an indigent defendant that his appointed counsel is not providing adequate representation, they should not be take lightly." Sawicki v. Johnson, 475 F.2d 183, 184 (6th Cir. 1973). An evidentiary hearing is necessary. Id. at 185. "A trial court's primary duty under the Sixth Amendment when confronted with a pretrial claim of inadequate preparation and consultation by counsel is to decide whether counsel has consulted with the defendant and prepared his case in a proper manner." Monroe v. United States, 389 A.2d 811, 819 (D.C. Cir. 1978). The trial judge "has a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations." Id. at 820. "Such an inquiry is necessary if the court is to determine whether good cause for substitution of counsel exists. Wilson, 733

F.2d at 428. Failing to conduct such an inquiry is normally reversible error. Young, 482 at 995." Melendez v. Salinas, 895 S.W.2d 714, 715 (Tex. App. – Corpus Christi, 1994).

This Court has set out specific requirements that must be followed for a trial court to appoint substitute counsel. Specifically, "good cause" must be shown to support the substitution of counsel. Deno v. Commonwealth, 177 S.W.3d 753, 759 (Ky. 2005). "Good cause" includes a "complete breakdown of communication between counsel and himself." Baker v. Commonwealth, 574 S.W.2d 325, 326 (Ky. App. 1978).

"The court must take the time to inquire when a defendant voices objections to appointed counsel." United States v. Allen, 789 F.2d 90, 92 (1st Cir. 1986). This raises "a question of the continued effective assistance of counsel." Lewis v. United States, 446 A.2d 837, 842 (D.C. 1982). State v. Goodine, 587 A.2d 228, 230 (Me. 1991). This did not happen when St. Clair voiced concerns about his counsel's representation. The specifics of the defendant's complaints must be addressed. Wilson, supra; Farrell v. United States 391 A.2d 755, 761 (D.C. 1978); Welty, supra at 190.

St. Clair's complaints were not addressed by the trial court; the majority of his allegations were simply placed on the record and ignored. The trial court's failure to conduct a full hearing regarding St. Clair's concerns deprived him of due process, the right to counsel and effective assistance of counsel as well as the right to equal protection contrary to the 5$^{th}$, 6$^{th}$ and 14$^{th}$ Amends., US Const. and § 2, 3, 7 and 11, KY Const.

**22. Michael St. Clair Was Denied His Right To Allocution.**

This issue is preserved. TR 3 316-320; A 63-67. The defense filed a motion pretrial requesting Michael St. Clair be allowed to allocate to the jury. At a pretrial

hearing held on August 10, 2005, the trial court entertained St. Clair's motion and denied it. TH, 8/10/05, 87-90.

An allocution is "a plea for leniency," Harris v. State, 509 A.2d 120 (Md. 1986). "It is designed to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances." United States v. Barnes, 948 F.2d 325 (7th Cir. 1991). "It includes, but is not limited to, statements of remorse, apology, chagrin, or plans and hopes for the future. DeAngelo v. Scheidler, 757 P.2d 1355, 1358 (Or. 1988).

The right to allocute is ancient and is "based on the four early cases of Rex v. Royce, 4 Burr. 2073, 98 Eng.Rep. 81 K.B.1767; The King v. Speke, 3 Salk. 358, 91 Eng.Rep. 872 K.B. 1689-1712; Rex & Regina v. Geaty, 2 Salk. 630, 91 Eng.Rep. 532 K.B. 1689-1712; Anonymous, 3 Mod. 265, 87 Eng.Rep. 175 K.B. 1669-1732." *See* P. Barret, Allocution, 9 Mo.L.Rev.15, 121 1944.

In Kentucky death penalty cases, it is particularly important that a defendant be permitted to allocute to the jury. *See* RCr 11.02(1). The jury is the actual sentencer under our scheme since no sentencing judge has ever substituted a verdict less than death when a jury has returned a verdict of death, and this Court has never exercised its authority, granted by KRS 532.075(3), to set aside a death sentence as excessive or disproportionate. The Kentucky death penalty experience has shown that the ultimate sentencer is really the jury. See State v. Rogers, 4 P.3d 1261, 1271 (Or. 2000); Harris v. State, 509 A.2d 120, 127 (Md.1986)(the trial court's denial of allocution before the jury at the penalty phase retrial for capital murder required vacation of sentence and remand for a new penalty phase).

Section Eleven, KY Const., specifies that "in all criminal prosecutions, the accused has the **right to be heard by himself and counsel."** (emphasis supplied). Furthermore, this right "shall forever remain inviolate; and all laws contrary thereto... shall be void." KY Const., § 26. This constitutional provision, in the context of an allocution, means that the defendant and his counsel must both be allowed to make an argument to the jury in a death penalty trial about why he should not be executed, based on any mitigating circumstance, including remorse. Lockett v. Ohio, 438 U.S. 586 (1978). "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961).

The Oregon Supreme Court has construed Oregon's constitution, which precisely mirrors, and was based upon, the Kentucky Constitution, to hold that a defendant has a constitutional right to make an unsworn statement to the jury, apart from any right to take the stand and testify under oath. State v. Rogers, 4 P.3d 1261, 1271 (Or. 2000). In Rogers, the Oregon court was called upon to construe that state's constitutional provision protecting the right of allocution, which is worded exactly like Kentucky's. *Id.* at 1271. Denying St. Clair the right to speak to the jury was error.

Michael St. Clair must be afforded a new penalty phase because of the trial court's action of denying him is right to allocution. He was denied his constitutional rights to be heard through himself and through counsel, to due process of law, to present a defense, and to be free from the infliction of cruel and unusual punishments. § 2, 7, 11, 17, KY Const.; 5th, 6th, 8th, 14th Amends., US Const.

**23. Denial Of Motions For Continuances And Funds To Secure Expert**

These issues are preserved. TR 3 375-378, TH 8/10/05 40-49; TE 19 41.

At a hearing one week before the re-sentencing began, the court considered several *pro se* motions, among them one asking for a continuance to secure a mitigation expert. TR 3 375-378, TH 8/10/05 40-49. St. Clair expressed concern in his motion that the mitigation expert hired by counsel had been sick and unable to perform. TR 3 377. He cited the fact counsel had not told him the name of the expert and there was hardly sufficient time for a thorough investigation to be conducted. At the hearing, counsel affirmed many of the statements in. St. Clair's motion, informing the court counsel had hired an investigator to locate and arrange for the transport of out-of-state witnesses to testify on St. Clair's behalf. TH 8/10/05 40. Counsel told the court he had only heard from the investigator two days prior to the hearing that she had been ill and unable to work. Id. at 41. Counsel stated they well may need a continuance if the investigator was unable to locate witnesses quickly. The court overruled the *pro se* motion. Id. at 49.

During the re-sentencing, counsel asked the court for a short continuance to attempt to locate an eyewitness expert, as the court's ruling that morning allowing the Commonwealth to present St. Clair's previous trial testimony made the issue vital. TE 19 27, 41. Counsel argued St. Clair's testimony during the prior trial concerned alibi testimony wherein he stated he was not even in Kentucky at the time of Brady's murder. Id. at 11. Counsel stated had they known the alibi testimony was going to be read to the jury, they would have prepared to call the eyewitnesses and an expert to dispute the reliability of their testimony. Id. at 41-42. The trial court denied both the continuance

motion and the motion for funds to secure an expert. Id. at 43. Counsel then moved for mistrial, which was likewise denied. Id. at 44

In Kentucky, appellate courts reviewing a trial court's denial of a continuance employ the analysis delineated in Snodgrass v. Commonwealth, 814 S.W.2d 579 (Ky. 1991). "Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." Id., 581. (Citations omitted).

The purpose behind the *pro se* motion for a continuance was to allow for time for an ill investigator to complete her work. The second motion was a direct result of sandbagging by the Commonwealth; counsel argued that at no time during the many sessions the parties met to determine the content of the witness summaries did the prosecution mention they were going to read St. Clair's prior testimony for the jury and that it was a deliberate omission.

Concerning previous continuances, defense counsel, in the entire history of the case and its sister case in Hardin County, requested only three continuances, one necessitated by the Commonwealth's failure to timely turn over exculpatory evidence and another because counsel had to have surgery. Id. at 42-43. Concerning inconvenience to the witnesses, the only inconvenience would have been to defense witnesses as the Commonwealth closed shortly after the inter-trial motion was denied. Certainly the delay was not purposeful as illness and surprise were the causes.

The fifth factor concerns the complexity of the case. There can be no more complex case than one that has essentially already been tried twice, once before in this county and once before in Hardin County on the related charges, and one where the ultimate outcome may be a sentence of death. The final factor for consideration is whether there is identifiable prejudice caused by the denial of the motion. The prejudice is clear; St. Clair stands condemned to death.

At trial, jurors are "entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place" on the prosecution's evidence. Davis v. Alaska, 415 U.S. 308, 317 (1974). A defendant's due process rights involve "the right to a fair opportunity to defend against the State's actions" and to "confront and cross-examine witnesses and to call witnesses in one's own behalf." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The denial of the continuance denied St. Clair "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984).

Further, it was error to deny St. Clair funds to secure an eyewitness expert. Sommers v. Commonwealth, 843 S.W.2d 879, 883-885 (Ky. 1992) held the denial of funding of a experts constituted prejudicial error and denied the accused the right to present an effective defense.

Reversal is required. 5th, 8th, 14th Amends., U.S. Const.; § § 2, 3, 11, 17 KY Const.

**24. Improper Admission Of Victim Impact Testimony.**

This issue is preserved. TR 3 304 – 315; TH 8/10/05 90 – 98.

The prosecution's first witness was Melanie Druin, one of Frank Brady's daughters. TE 13 90 – 98. She identified her two sisters, the fact she had four children, where she grew up, and where her mother worked, all before she began discussing her father. TE 13 90 – 91. She informed the jury her dad worked at Barton Brands for 39 years and never missed a day of work. TE 13 91. Her dad was a very hard worker and was very dedicated to his job, which was very important to him. Id. It was very important for him to live by example. Id. His interests were his children, his family and gardening. Id. He was an avid gardener and exceptional, exceptional, exceptional fiddle player. Id. He loved music, the outdoors and spending time with his family. Id. Ms. Druin testified summertime with gardening and canning was a big deal at her house and a family ritual. Id. at 92. Her dad was very proud of that. Id. He liked to listen to music, mostly country, but was an exceptional fiddler, gifted in every way. Id. at 92 – 93. He was unable to read music and played totally by ear. Id. Although country music was her dad's favorite, the girls were exposed to many different types of music. Id. Her dad was an exceptional cook and liked to get up and fix Saturday breakfast when the girls visited on the weekend. Id. Her dad came from a very large family and was very close to every one of his siblings. Id. They were a very big part of his life. Id. Crying, Ms. Druin testified her dad only got to know four of his five grandkids as her youngest son was born six weeks after his death. Id. at 93 – 94. Her dad loved his grandkids, loved to hold the babies, loved to feed the babies, loved to just dote on them. Id. He was very proud of them. Id. Ms. Druin said that at 6'4" and 290 pounds, her father certainly had a presence. Id. He

liked to laugh, had quite a sense of humor and was a good man. Id. His favorite color was purple. Id. Ms. Druin remembered his smile and his laugh. Id. Asked if she remembered his eyes, she cried and said they were deep brown, incredibility dark brown and that he had a gentle face. Id. at 95. When asked how he smelled, she said English Leather. Id. Ms. Druin very much remembered her father as her parent and there are things she does as a parent because of him. Id. She had seen her father pray. Id. The girls were brought up very Catholic by her very religious father. Id. Religion was very important to him and his faith gave him a lot of comfort. Id. Ms. Druin visited her parents a lot after she moved away. Id. at 96. It was fun coming home because she knew her dad would fix a big breakfast and they would eat like kings because that was important to him; that was his way of saying he loved them. Id. Her day always worried about his girls when they traveled and told them to lock their doors, don't stop anywhere, and call when home. Id. He was very protective of his three girls. Id. In the spring and summer, when she left after a visit, her dad would come over to the car and give her a flower. Id. at 96 – 97. It was his way of saying goodbye and I love you. Id. Crying, Ms. Druin identified her dad in front of a Christmas tree in a photograph. Id. That was always a big holiday for him. Id. Ms. Druin last heard her father's voice in September 1991. Id. at 98. He called when they were literally on their way out the door to meet with their builder so she made it very brief and told him she had to go. Id.

Not surprisingly, in closing argument, the prosecutor played on the emotion of this testimony. TE 24 25 – 26, 31 – 32.

"Victim impact evidence" is penalty phase information, presented to a death penalty sentencing jury, "relating to the personal characteristics of the victim and the

emotional impact of the crimes on the victim's family." Payne v. Tennessee, 501 U.S. 808, 817 (1991). In Payne, the Court said "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar," Payne at 827. This overruled Booth v. Maryland, 482 U.S. 496, 40 (1987), which forbade such evidence.

Before Payne, this Court routinely condemned the introduction of evidence "to engender sympathy for the victim and her family," Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984). In Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997), this Court reversed itself. "[T]he harm, inflicted upon the families, loved ones, and community of the slain victim is an integral element in the assessment of the criminal's blameworthiness"; evidence about the life and character of the deceased shows "the full extent of harm caused by the crime", because "each victim has a distinct measure of societal worth". Id. at 303.

KRS 532.025 sets forth the evidence admissible at a penalty phase of a death penalty trial. But none of the aggravators deal with victim impact information. The plain text of our statute governing capital death penalty cases does not provide for victim impact evidence to be introduced. No mention at all is made of such evidence. This stands in stark contrast to our statute governing penalty proceedings in felony cases; KRS 532.055(2)(a) states specifically that, in felony cases, the Commonwealth may offer evidence relative to sentencing, including "(t)he impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim." Such language is completely absent from our death penalty statute.

Under current U.S. Supreme Court precedent concerning victim impact evidence in death penalty cases, before such evidence can be used against a death penalty defendant, the state legislature must have made provision for it. This principle comes from the Booth and Payne opinions. In Booth, the Court dealt with a Maryland statute explicitly authorizing victim impact evidence in the sentencing phase of a death penalty trial. The justices who dissented in Booth, and who ultimately carried the day later as the majority in Payne, explained: "[D]eterminations of appropriate sentencing considerations are peculiarly questions of legislative policy," Booth at 515 (White, J., dissenting, joined by Rehnquist, C.J., O'Connor, and Scalia, JJ)(internal citation omitted). "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Id.

The majority in Payne observed that "Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant." Payne at 821. Justice O'Connor's concurrence also noted that "[m]ost of the States have enacted legislation enabling judges and juries to consider victim impact evidence," Id. at 831. (White and Kennedy, J.J., joining). Justice Scalia also wrote a concurrence, in which he stated that the Eighth Amendment "permits the people to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime," Id. at 833. (O'Connor and Kennedy, J.J., joining). There is no "enabling legislation" from the General Assembly in Kentucky. See Olsen v. State, 67 P.3d 536, 592 (Wyo. 2003); Commonwealth v. Fisher, 681 A.2d 130, 144 (Pa. 1996).

This Court has observed that victim impact evidence is "testimony, which would have made the jury more likely to impose the death penalty." Hodge v. Commonwealth, 68 S.W.3d 338, 343 (Ky. 2001). It is also not authorized by the required statutory law. Accordingly, the prosecutor's introduction and use of it was unlawful and requires that St. Clair be afforded a new penalty phase without a jury that has been inflamed by passions. 6th, 8th, 14th, Amends., US Const.; § 1, 2, 7, 11, 17, 26, 27, KY Const.

**25. Failure To Disclose Exculpatory Evidence**

Prior to trial, Michael St. Clair filed, *pro se*, a motion seeking to dismiss the charges against him because of the Commonwealth's failure to disclose a tape recording of an interview he gave to Det. John Carr at the Oklahoma State Penitentiary. TR 2 232-234. In his motion, St. Clair alleged the contents of the tape support his contention Dennis Reese actually committed the murder of Mr. Brady and the tape therefore contains exculpatory information that should have been disclosed to the defense. Id. Further, St. Clair alleged it was divulged in an Oklahoma hearing that the tape recording was "lost" by the prosecution and the Oklahoma court dismissed all charges against him because of the loss. Id.

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the prosecution has a duty to disclose exculpatory evidence. This error was not harmless. Chapman v. California, 386 U.S. 18, 24 (1967). The failure to turn over this tape denied St. Clair a meaningful opportunity to present a complete defense. Crane v. Kentucky, 476 U.S. 683, 689 (1986). Further, the purportedly exculpatory evidence not turned over raises a residual doubt as to St. Clair's culpability. 'Residual

doubts' about a capital defendant's guilt or moral culpability can be considered by a penalty phase jury and can legitimately support a sentence less than death. Lockhart v. McCree, 476 US 162, 181-182 (1986). Since there was exculpatory evidence that would support a genuine doubt about St. Clair's guilt, his death sentence violates the 8th, 14th Amends., US Const.; §§ 2, 3, 11, 17,26, KY Const. This Court should vacate his sentence.

**26. Limits On Testimony Of Payne And Improper Cross-Examination**

Preserved. Don Ed Payne of Oklahoma testified for the defense. TE 15 118. Payne had represented St. Clair in Oklahoma on two murder charges. Id. at 18 121. On direct, counsel asked Payne whether there had been a "negative history" between St. Clair and the victims of the Oklahoma murders. Id. at 123. The Commonwealth objected to the question on the basis Payne's answer would likely come from hearsay. Id. at 128. Counsel responded Payne had represented St. Clair during the trial and was testifying as to what he had personally witnessed during the trial. Further anything he would proffer would not be offered for the truth of the matter asserted and therefore not constitute hearsay. Id. at 128, 130. The trial court sustained the objection. Id. at 131.

Payne testified by avowal that the St. Clair family believed one of the victims had been responsible for shooting and paralyzing one of St. Clair's brothers. TE 16 155. The other victim was believed by the St. Clairs to have stabbed their aunt. Id. at 156.

Counsel attempted to question Payne about the St. Clair family's mental illness. TE 15 135. He attempted to tell the jury that St. Clair's aunt had taken the stand during his trial and testified little green and red men visited her in her jail cell, but an objection

by the Commonwealth cut him off. Id. at 138, TH 16 157. The Commonwealth argued that anything Payne had heard in court was hearsay and the court sustained the objection. TE 15 139.

On cross, the prosecution asked Payne about whether St. Clair's Oklahoma conviction was aggravated by prior murder convictions and offered him an Oklahoma court form to review. Id. at 146. However, the form the prosecution tendered was not from the trial Payne participated in, but was from a different proceeding. Id. at 149. The court overruled defense counsel's objection. Id. at 149.

The defense was attempting to establish St. Clair's prior murder convictions in Oklahoma did not involve the random killing of strangers, but instead involved those with whom the family had long-standing conflict. This evidence was vital because of the prosecution's characterization of St. Clair in the opening as a "serial killer." TE 13 48. The testimony elicited from Payne was clearly not hearsay. On avowal Payne testified it was "the belief of several members of Michael's family was that Ed Large, some years before the homicides in Choctaw County, had shot Michael's brother, David, and left him partially paralyzed. I know nothing factually about that incident but that was either knowledge or a myth that was prevalent in the St. Clair family." TE 16 155-156. There is nothing in his testimony that ascribes a statement to any person.

KRE 801 defines hearsay as "a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c)(emphasis added). Payne was being asked whether he had become aware, in the course of his representation of St. Clair, of any conflict between him and his family and the victim, Large. TE 15 123. This question does not elicit hearsay, but is

asking what Judge Payne discovered, himself, during his representation. Similarly, as an attorney who had represented St. Clair in a double-murder trial, he was bound to have gained information as to the mental health of the family. His presence during the trial wherein St. Clair's aunt testified she talked with little red and green men was not hearsay as the utterance was not being offered for the truth of the matter asserted, and it was clear that Payne had formed a reliable opinion based upon his experiences with the family during his representation.

In Young v. Commonwealth, this Court held that a person may express their opinion about the beliefs of another, even if that opinion is based on hearsay. "An exception occurs if the opinion is based on the witness's own factual observations or perceptions. We have held that the "collective facts rule" applies to this type of opinion if the witness is expressing an opinion about another's mental conditions and emotions "as manifested to that witness." That is but another way of saying that the witness's opinion must be based on the witness's own observations. 50 S.W.3d 148, 170 (Ky. 2001)(internal citations omitted). Payne's testimony was based upon his own investigations and observations during his representation of St. Clair and was clearly admissible. It was error to exclude the testimony from the hearing of the jury. Reversal is required. 6th, 14th Amends., US Const., §§ 2, 10 KY Const.

**27. Witness Summaries Violated Mr. St. Clair's Right To Confrontation.**

Unpreserved. The trial court's erroneous decision to allow witness summaries from the guilt-innocence phase rather than compelling these witnesses to testify in person at the retrial of the penalty phase violated Michael St. Clair's right to due process as

guaranteed by the 5th and 14th Amends., US Const., and § 2 and 11, KY Const. and his right to properly confront witnesses as guaranteed by the 6th Amend. US Const. and § 11, of the KY Constitution.

The state and federal constitutions, as well as the rules of criminal procedure, envision the production of live witnesses during criminal proceedings. The 6th Amendment mandates that the accused shall "be confronted with the witnesses against him," and § 11 of the KY Constitution affords the accused the right "to meet the witnesses face to face."

The parties in this case agreed to use witness summaries in lieu of live testimony for 26 witnesses. Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992). This Court should not allow such a procedure because such summaries are pure hearsay. As Justice Liebson stated in his dissenting opinion in Boone, supra,:

> This Court should not countenance, let alone create, a procedure which contemplates using as the trial judge's "summaries of the evidence," his memory and opinion as to what was the evidence at a former trial *as evidence* in a new trial for two reasons: First of all, it is *rank hearsay;* violation of a concept so fundamental it should need no amplification:
>
> "[I]n the 19th century, the so-called *hearsay rule* became one of the dominant rules of the law of evidence.... one simple, if utopian, idea, ... juries should not hear secondhand evidence; they should hear Smith's story out of his own mouth, and not Jones's account of what Smith had to say." Prof. Lawrence M. Friedman, "A History of American Law," 2d ed., p. 153 (1985)
>
> Second, permitting the use of court summaries of the evidence *as evidence* cannot fairly be considered as simply construing or interpreting the Truth-In-Sentencing statute; it is, in a word, *supplementing* the statute. To supplement the statute violates basic principles on separation of powers mandated by the Kentucky Constitution, Secs. 27 and 28."

There is no exception to the hearsay rule permitting the parties to state their opinion as to what was said at the previous trial, for the jury to use as evidence at the retrial.

Notwithstanding Boone, supra, the witness summaries used at St. Clair's penalty phase trial violated his right to due process and his right "to meet the witnesses face-to-face." Ky. Const., § 11; Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990). 5th, 6th and 14th Amends. US Const.; §§ 2 and 11, KY Const. Reversal is required.

**28. Introduction Of Extraneous, Prejudicial Information About Prior Convictions.**

This issue is preserved. TE 21 3.

The prosecution called Doris Cornell, Bullitt Circuit Clerk, to testify about details concerning St. Clair's Oklahoma convictions in an effort to prove the aggravating factor of "murder...was committed by a person with a prior record of conviction for a capital offense." TE 20 210 – 232; TE 21 24 – 25. Directed by the prosecutor, Ms. Cornell testified extensively and repetitively about the relevant particulars—including date of the crime, name of the victim, the crime charged, maximum possible sentence, the conviction, date of verdict and/or final judgment and sentence imposed--based on her viewing of the certified Oklahoma records. Id. Despite the fact that all the relevant and necessary details were contained in this testimony as well as the final judgments, the prosecutor felt compelled to have Ms. Cornell read selected details from the charging information on three of the convictions:

> That is to say the Defendant did unlawfully, wrongfully, knowingly, willfully, and feloniously, without authority of law, and with the premeditated design to effect the death of one Ronnie St. Clair, a human being, did aid and abet the killing of one Ronnie St. Clair, by means of a firearm loaded with powder and shot, held in the hands of one William Henry Kelsey Jr., and with which William Henry Kelsey Jr. fired shot into the body of the said Ronnie St. Clair causing mortal wounds in the body of said Ronnie St. Clair, from which mortal wounds of said Ronnie St. Clair did languish and die, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Oklahoma.

> Count Two: That is to say the Defendant did unlawfully, wrongfully, knowingly, willfully, and feloniously solicit one William Henry Kelsey Jr. to cause the death of one Ronnie St. Clair by the act of Murder in the First Degree. Such to be effected by the unlawful, wrongful, knowing, willful, and felonious killing of Ronnie St. Clair by means of a firearm loaded with powder and shot, without authority of law and with a premeditated design to effect the death of Ronnie St. Clair.
>
> That is to say that Defendant did unlawfully, wrongfully, knowingly, willfully, and feloniously, without authority of law, a with a premeditated design to effect the death of one William Henry Kelsey Jr., a human being, did then and there kill one William Henry Kelsey Jr. by means of a firearm loaded with powder and shot, held in the hands of the said Defendant, and with which he fired shot into the body of the said William Henry Kelsey Jr., causing mortal wounds. That said William Henry Kelsey Jr. did languish and die, contrary of the statutes and such cases made and provided, and against the peace and dignity of the State of Oklahoma. TE 20 221 – 222.

It was improper for the court to admit evidence of the particulars of the information since this resulted in the introduction of unnecessary and prejudicial evidence about the nature of the crimes. Taylor v. Commonwealth, 449 S.W.2d 208, 210 (Ky. 1970) considered this issue in the PFO context and held "the court committed error when it overruled appellant's objection to the reading of the indictment under which he was formerly convicted." Hardin v. Commonwealth, 573 S.W.2d 657, 661 (Ky. 1978) held "[i]t is impermissible to present to the jury facts upon which a person charged with being a persistent felony offender was initially tried...." "[T]he Commonwealth has no right to show the facts with reference to the previous convictions." Tall v. Commonwealth, 110 S.W. 425, 528 (Ky. 1908). See Pace v. Commonwealth, 636 S.W.2d 887 (Ky. 1982); Hibbard v. Commonwealth, 661 S.W.2d 473 (Ky. 1983); Bray v. Commonwealth, 703 S.W.2d 478, 480 (Ky. 1985), Berning v. Commonwealth, 550 S.W. 561 (Ky. 1977) and Hudson v. Commonwealth, 979 S.W.2d 106 (Ky. 1998). Perdue v. Commonwealth, 916 S.W.2d 148, 165 (Ky. 1995) condemned the combination of the capital penalty phase hearing with a truth-in-sentencing hearing which resulted in reading

prejudicial details from indictments into evidence: "That such information was before the jury at the most critical phase of the trial is sufficient to destroy our confidence in the reliability of the jury verdict."

Since it is likely the prejudicial evidence contributed to the death verdict obtained, this Court must reverse St. Clair's death sentence. 8th, 14th Amends., US Const.; § 2, 3, 11, 17, 26, KY Const.

## 29. St. Clair's Death Sentence Is Arbitrary And Disproportionate.

This issue is unpreserved but its review is mandated under KRS 532.075.

St. Clair's death sentence is unconstitutional considering the particular circumstances of his case and St. Clair himself, as well as comparing his case with other similar cases. In Smith v. Commonwealth, 599 S.W.2d 900, 912 (Ky. 1980), this Court stated "each and every mitigating circumstance, by reason that it is mitigating, is pitted against aggravating circumstances." It is implicit in our sentencing scheme that death will not result unless aggravation outweighs mitigation. In St. Clair's case, the aggravation does **not** outweigh the mitigation.

There is compelling mitigation in this case. Michael St. Clair came from an extremely poor, uneducated, alcoholic, abusive, volatile family with a history of mental illness. had congenital brain dysfunction that caused him to have seizures and be disinhibited. He also had a personality disorder, had a borderline I.Q. of 77 and was in special education classes before he dropped out of school. He was not known to drink or smoke, or to travel too far from the area where he was raised. 's prior murder convictions in Oklahoma all involved people with whom he and his family had a difficult history.

Those convictions garnered multiple LWOP sentences in Oklahoma. Moreover, there is a strong residual doubt about his guilt in this case.

Additionally, other cases with similar or worse offenses and aggravating factors have not resulted in a death sentence. Such cases include: Reyes v. Commonwealth, 764 S.W.2d 62, 62-63 (Ky. 1989)(case described as "one of the most heinous and infamous in Christian County history;" murder, attempted murder, first degree robbery and two counts of first degree sodomy; while in custody awaiting trial, Reyes escaped – life sentence); Commonwealth v. Phon, 17 S.W.2d 106 (Ky. 2000) (2 execution-style murders, first degree assault, first degree robbery, first degree burglary - life without parole). St. Clair's death sentence cannot stand because many others who “deserve” capital punishment as much, or more than he have escaped it. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

The intra-case disproportionality is also concerning. The nagging question is who was the shooter. Reese, who pled guilty and received LWOP 25, self-servingly testified St. Clair was the shooter. TE 13 120 – 123; TE 14 236. St. Clair denied he was ever in Kentucky. TE 19 146 – 148; TE 20 209 – 210; OTE 21 2687-88; 22 2783. At the original trial, Jeff Libby testified Reese had confessed he was the shooter. OTE 20 2527-31. Ernie Smith testified at the original trial Reese told him he actually pulled the trigger but was going to finger St. Clair as the shooter. OTE 22 2800-01, 2835. At the re-sentencing, Smith testified Reese told him he and St. Clair split up shortly after they escaped from jail and he (Reese) later killed a man in Kentucky for his pick-up TE 21 45 - 48. No physical evidence made it more probable that St. Clair was the shooter rather than Reese. Even the trial court stated the evidence does not foreclose all doubt about St. Clair's guilt.

RTJ § C(11). To uphold the conclusion that death is the appropriate punishment for St. Clair based on this set of facts violates principles of fundamental fairness and justice.

For the state to pass over more "deserving" defendants, and strike randomly at St. Clair, indicates that our legal system functions more akin to the whims of a monarchy than to the logically deliberate actions of a just society. In Bush v. Gore, 531 U.S. 98 (2000), the Court found that a state's election ballot-counting scheme violated equal protection guarantees where the standard for what constituted a valid vote varied from county to county within the state, and where some counties had no set standard which they applied to all of its own ballots. The same court which decided Bush v. Gore has mandated that a state must use a rational standard in deciding who lives and who dies at the hands of the state. Kentucky has no rational standards for making such decisions and for avoiding the "arbitrary and disparate treatment" condemned by Bush v. Gore.

Just as a state may not value one person's vote over that of another, Bush v. Gore, supra at 104-105, so must a state have a means of making sure that it does not value one person's life over that of another "by . . . arbitrary and disparate treatment," Id. This is a matter of both state and federal constitutional equal protection.

St. Clair's death sentence is arbitrary and disproportionate considering his mitigation, the circumstances of his case, and other cases in which death was not imposed for similar or worse crimes with less compelling mitigation. His death sentence must be reversed. § 1, 2, 3, 7, 11, 17, 26, KY Const.; $8^{th}$, 14th Amends., US Const.

**30. Improper Use Of Unauthorized Aggravator To Enhance Death Sentence.**

This issue is unpreserved but jurisdictional.

The Indictment returned in this case on February 11, 1992, charged St. Clair and Dennis Reese with the October 6, 1991 "capital murder by shooting Francis Brady with a pistol." OTR 1 1; OTR 3 436-37. The Indictment failed to charge the existence of any aggravating factor that would enhance the penalty range to include a sentence of death. Four years after Indictment, the prosecution filed a Notice of Intent to Seek Death Penalty. OTR 3 308-33. This notice indicated the prosecution's intent to rely on the aggravator found in KRS 532.025(2)(a)(1): "The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense." Id. At a trial held in 1998, St. Clair was found guilty and sentenced to death. Following this Court's 2004 reversal of the death sentence imposed at that trial, no notice of evidence in aggravation was filed by the prosecutor.

The original notice was not adequate under KRS 532.025(1)(a).The proffered evidence in aggravation failed to establish any statutory aggravating factor under then-existing law. See Arg 5. More importantly, both the Indictment and notice failed to satisfy 14th Amend. due process or 6th Amend. notice guarantees. Jones v. United States, 526 U.S. 227, 243, n.6 (2000), held that under the due process clause and notice and jury trial guarantees of the 6th Amend. "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment...." See also Apprendi v. New Jersey, 530 U.S. 466 (2000). These principles apply to aggravators in death penalty cases. "The dispositive question . . . is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent upon the

finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt. A defendant may not be expose(d) . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ring v. Arizona, 536 U.S. 584, 602 (2002).

The formality, timing and specificity of notice mandated by the US Constitution were not met in St. Clair's case. Additionally, the Indictment failed to give the trial court jurisdiction to try St. Clair for aggravated murder and subject him to enhanced penalties, including the death penalty.

While the 14th Amend. has not yet been construed to include the 5th Amend. requirement of Indictment by a grand jury, see Apprendi at 477, n. 3, the Ky. Const. §12 requirement of an Indictment is co-extensive with the 5th Amend. right. Once a state extends the grand jury right, it must comply with the commands of the 14th Amendment equal protection clause. Rose v. Mitchell, 469 U.S. 545, 557 (1979); Evitts v. Lucey, 469 U.S. 387 (1985). Thus, §12, KY Const., and the 5th and 14th Amends. all require that facts that increase the maximum penalty for a crime must be charged in the Indictment.

Even though the requirement of grand jury Indictment has not been applied to the states by the Supreme Court, Illinois has applied Apprendi and held prosecutions for enhanced sentences require grand jury Indictment on enhancement facts. People v. Lucas, 746 N.E.2d 1211 (2001), appeal denied by People v. Lucas, 755 N.E.2d 481 (2001). New Jersey has applied Ring to require, under that state's constitution, that aggravators must be submitted to and found by the grand jury, as reflected by the Indictment, in order to render the defendant eligible for the death penalty. State v. Fortin, 843 A.2d 974 (N.J. 2004). See also State v. Apao, 586 P.2d 250, 257-258 (Hawaii 1978).

An Indictment, such as the one in this case, that does not charge the aggravator in addition to the underlying murder, implicitly does not "unmistakenly" charge all the necessary elements of aggravated kidnapping. See Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996); Jackson v. Commonwealth, 20 S.W.3d 906 (Ky. 2000)(PFO enhancement charge under KRS 532.080 must be alleged by Indictment). In Malone v. Commonwealth, 30 S.W.3d 180, 183 (Ky. 2000), this Court stated:

> Jurisdiction is a court's power to decide a case. As a prerequisite for presiding over a case, a court must have jurisdiction of the subject matter of an offense....A criminal prosecution requires the existence of an accusation charging the commission of an offense. Such an accusation either in the form of an indictment or an information, is an essential requisite of jurisdiction. In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in cases where the individual consents.

Accordingly, unless the Indictment is waived by the defendant, the circuit court's jurisdiction is defined and limited to the offenses validly charged in the Indictment. See State v. Trusty, 919 S.W.2d 305, 309 - 10 (Tn. 1996). This is a matter of fundamental constitutional law, not just Kentucky constitutional law. See, e.g., Ex Parte Bain, 121 U.S. 1, 12 - 13 (1960) ("an indictment found by a grand jury [is] indispensable to the power of the court to try petitioner for the crime with which he was charged"); Stirone v U.S., 361 U.S. 212, 217 (1960)("court cannot permit a defendant to be tried on charges that are not made in the indictment against him"). Federal constitutional law also requires that the Indictment be valid to convey jurisdiction for sentencing. See, e.g., U.S. v. Cotton, 261 F.3d 397, 404 - 405 (4th Cir. 2001).

The defect in the Indictment here is the failure to state essential elements of the offense and to reflect that a grand jury considered and found aggravating factors to support penalty enhancement. This was required by Jones, Apprendi, and the state and

federal constitutions. This defect rendered the trial court without jurisdiction to sentence St. Clair to any aggravated sentence and requires that his death sentence be vacated. Cotton, supra; U.S. v. Thomas, 274 F.3d 655 (2nd Cir. 2001); U.S. v. Buckland, 259 F.3d 1157 (9th Cir. 2001); U.S. v. Sanchez, 269 F.3d. 1250 (11th Cir. 2001).

The Jones "other than prior conviction" exception to this rule does not apply in the context of this case.[8] The out-of-state convictions used in an attempt to satisfy one of the aggravators were all charged by information rather than Indictment and carried none of the formalities or protections of Indictments returned by grand juries. See Jones, supra at 249. Moreover, the KRS 532.025(2)(a)(1) aggravator does not confer a mere recidivist status.[9] Because Kentucky is a non-weighing death penalty state,[10] aggravators–including KRS 532.025(2)(a)(1)–are requisite factual elements that must be found by a jury beyond a reasonable doubt before murder, with a sentence range of 20 years to life, can be elevated to aggravated murder with a sentence range of 20 years to life, LWOP/25, LWOP or death. Because the finding of an aggravator operates in Kentucky to significantly increase the penalty range, the aggravator must be charged in the Indictment if the prosecution wishes to use that factor to enhance murder to aggravated murder and thereby increase the potential penalty range.

St. Clair has been denied his rights under the 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 12, 17, 26, KY Const. This Court must remand for resentencing to a non-aggravated sentence.

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[8] Although the Apprendi decision purported to include a "prior conviction" exception to the general rule announced in that case, a majority of the justices have now rejected the reasoning of this exception, which is based on Almendarez-Torres v. United States, 523 U.S. 224 (1998). See Apprendi at 489, and 518, 520-521 (Thomas, J. concurring). Accordingly, it is unlikely the "prior conviction" exception continues to be viable under any circumstances.

[9] Although, Kentucky requires that even recidivism be charged by indictment. KRS 532.080; Price v. Commonwealth, 666 S.W. 2d 749, 750 (Ky. 1984); Jackson v. Commonwealth, supra.

[10] Sanders v. Commonwealth, 801 S.W.2d 665, 683 (Ky. 1990).

**31. Lethal Injection And Electrocution Are Cruel And Unusual Punishment.**

This issue is not preserved.

"Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). St. Clair was sentenced to death by lethal injection. KRS 431.220(1)(a). The crucial factor in assessing whether lethal injection violates the prohibitions against cruel and unusual punishment is whether, as a method of execution, it is contrary to the "evolving standards of decency that mark the progress of a maturing society[.]". Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

To meet the "evolving standards of decency" test a mode of execution must ensure a quick and painless death. This principle stems from the recognition that the 8th Amendment prohibits "the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion). Punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering [.]" Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947). Thus, for the condemned to suffer a lingering or painful death violates the constitutional prohibitions against cruel and unusual punishment.

This mode of execution does not comport with 8th Amend. and §17 requirements because of the substantial likelihood it will result in undue pain and suffering. There are numerous instances of botched executions using lethal injections. See Deborah Denno,

*When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 139-141 (2002) (Table 9); Radelet, *Post-Furman Botched Executions*, at http://www.deathpenaltyinfo.org/article.php?scid=8&did=478 (providing information on 28 well known botched lethal injections in various states including at least 8 executions where the inmate was conscious); Stephen Trombley, *The Execution Protocol*, (1992).[11]

Kentucky carries out lethal injections by injecting: 1) sodium thiopental; 2) pancuronium bromide; and, 3) potassium chloride. Sodium thiopental is a short-acting barbiturate that begins to wear off almost immediately. Sodium thiopental was first adopted as part of the lethal injection protocol at a time when it was used for surgical procedures, but it has since been replaced in surgical settings by propafol. Pancuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscle movements, but has no impact on the ability to feel pain. It prevents a person from speaking, moving, or expressing any other outward signs of pain or consciousness, but is extremely agonizing in a conscious person as the inflicted person suffocates just as if he or she was drowning with weights on his or her body to prevent movement. Potassium

[11] Ohio recently carried out an execution that took approximately 90 minutes, as the condemned inmate looked up and said the chemicals are not working. See, Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, New York Times (May 3, 2006); John Mangels, *Condemned Killer Complains Lethal Injection 'Isn't Working*,' The Plain Dealer (May 3, 2006); Jim Provance and Christina Hall, *Problems Bog Down Execution of Clark: Drugs Take his Life After 86 Minutes*, Toledoblade.com (May 3, 2006); Reuters, *Killer Executed the Hard Way: Condemned Man Sits Up and Tells Executioners, 'It's Not Working,'* Cnn.com (May 2, 2006); Erica Ryan, *Injection Problems Delay Ohio Execution*, HoustonChronicle.com (May 2, 2006). A year later, Ohio carried out another lengthy execution. This time it lasted 2 hours - - so long the condemned inmate had to take a bathroom break. See, Julie Carr Smyth, *After States' Longest Delay, Man Executed for Cellmate Murder*; Chillicothegazette.com (May 24, 2007); Julie Carr Smyth, *Ohio Executes Man for Killing Cellmate*, Philly.com (May 24, 2007). Florida carried out an execution that took 34 minutes as the inmate grimaced in pain and moved throughout. Officials later realized he suffered twelve inch chemical burns on both arms. *See*, Ron Word, *Official: Execution Took Longer Because Needles Pierced Veins*, Orlando Sentinel (Dec. 15, 2006); Phil Long and Marc Caputo, *Lethal Injection Takes 34 Minutes to Kill Inmate*, MiamiHerald.com (Dec. 14, 2006); Chris Tisch and Curtis Krueger, *Second Dose Needed to Kill Inmate*, TampaBay.com (Dec. 14, 2006); Chris Tisch and Curtis Krueger, *Executed Man Takes 34 Minutes to Die*, TampaBay.com (Dec. 13, 2006).

chloride, otherwise known as road salt used to melt ice, is injected to cause cardiac arrest, but is excruciatingly painful in a conscious person.

When used in lethal injections, sodium thiopental serves the purpose of rendering the condemned inmate unconscious. Pancuronium bromide is supposed to stop respiration, and potassium chloride is supposed to cause cardiac arrest. Because potassium chloride stops the heart from beating, death can and would be caused without the use of pancuronium bromide - - a drug that is not permitted to be used to euthanize animals. Other than to pronounce death, doctors are not involved in Kentucky lethal injections, and the chemicals are injected from a room adjacent to the execution chamber.

Manufacturers warn that without careful medical supervision of dosage and administration, barbiturates can cause "paradoxical excitement" and can heighten sensitivity to pain. See Physicians Desk Reference, 50th Ed., 438-40. Manufacturers warn against administration by IV injection unless a patient is unconscious or out of control. Id. An inmate's weight, physical condition and age are critical when adjusting dosage. Because doctors are prohibited from participating in the administration of lethal injection, KRS 431.220(3), proper consideration of these factors is not assured. There is a great risk of unnecessary, wanton infliction of severe pain and suffering. Lethal injection is "error prone" under the best of circumstances and can leave prisoners paralyzed but conscious during a painful death. The administration of these drugs has led to numerous, horrific mistakes. Radelet, supra.

Indeed, the Federal District Court for the Middle District of Tennessee recently held unconstitutional that state's protocol for lethal injection, which includes the same three drug combination as Kentucky's. The court said the three drug lethal injection

presents "a substantial risk of unnecessary pain" because, if the drugs are not administered with proper anesthesia, the result can be "a terrifying, excruciating death." Harbison v. Little, ___ F.Supp.2d ___, 2007 WL 2821230 at 11 (M.D.Tenn. 2007).

Should this Court hold that lethal injection is forbidden constitutionally as a method of execution, KRS 431.223 requires that a prisoner be executed in the manner in existence before the lethal injection statute was enacted – electrocution. But electrocution is also a cruel and unusual punishment. Execution by electrocution involves a reversion to the penal style of a preceding era; the condemned prisoner:

> cringes, leaps, and fights the straps with amazing strength. The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire . . . sounds like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber . . . the prisoner almost literally boils . . . . The body frequently is badly burned and disfigured.

Glass v. Louisiana, 471 U.S. 1080, 1087-88 (1985) (internal citations omitted) (Brennan, J., dissenting from the denial of certiorari on the constitutionality of electrocution).

As many legislatures and courts have recently concluded, "[t]here comes a time when the Constitution must say 'enough is enough.'" Id. Legislatures have consistently abandoned this archaic method. The Georgia Supreme Court, has held electrocution violates the 8th Amendment. No other country currently uses electrocution as a form of punishment. Only Nebraska out of 40 death penalty jurisdictions including the federal government and the military employs electrocution as the sole method of execution. Kentucky, like Georgia, should abolish execution by electrocution for all time.

Section 17 of the KY Constitution forbids the use of cruel punishment. "Punishments are deemed cruel when they involve torture or a lingering death...." In re Kemmler, 136 U.S. 436, 447 (1890). The prohibition against cruel and unusual punishment embraces unnecessary mental as well as physical pain and suffering during the execution process. Weems v. U.S., 217 U.S. 349, 370 (1909). Central to the analysis is the **risk** of inflicting substantial and prolonged pain. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) and Hellings v. McKinney, 509 U.S. 25, 36, (1993). Though Kentucky may not be constitutionally obliged to make executions absolutely pain-free, significant, conscious pain that lasts for more than a few seconds is constitutionally intolerable. See Fierro v. Gomez, 865 F.Supp. 1387, 1413 (N.D. Cal. 1994). This Court should rule lethal injection and electrocution violate the 8th Amendment and §17 prohibitions against cruel and unusual punishment and vacate St. Clair's death sentence.

**32. The Death Penalty Is Unconstitutional.**

Unpreserved. However, KRS 532.075 mandates this Court review imposed death sentences to determine whether they are arbitrary, disproportionate or invalid.

**A. KRS 532.025 Is Unconstitutional Because It Does Not Narrow The Class Of Persons Eligible For The Death Penalty.**

The 8th Amendment requires a state's scheme properly establish a threshold below which the death penalty cannot be imposed. That procedural structure must include rational criteria to narrow the decision-maker's judgment as to whether a particular defendant meets the threshold. If the criteria are applicable to every murderer, then the statutory scheme and criteria are unconstitutional. Tuilaepa v. California, 512 U.S. 967 (1994); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972);

Zant v. Stephens, 462 U.S. 862 (1983); Walton v. Arizona, 497 U.S. 639 (1990); Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994). This Court's interpretation of KRS 532.025 in Jacobs,[12] renders the Kentucky death penalty scheme unconstitutional.

KRS 532.010(1) provides that capital offenses are specific types of felonies and have a specific sentencing statute, KRS 532.030(1). Jacobs, at 420. KRS 532.030(1) provides that any person convicted of a capital offense may have his punishment fixed at death, LWOP/25, LWOP, life, or imprisonment for not less than 20 years. Murder is defined as a "**capital offense**," not a **Class A felony**; therefore, the death penalty or LWOP or LWOP/25 are applicable sentences. KRS 507.020.

Previously, KRS 532.020 did not mean that **all** murders, which by statute are capital offenses, were death eligible. Statutory aggravators were presumed to have to exist and be found beyond a reasonable doubt before the death penalty, LWOP or LWOP/25 could be imposed. The final sentence of KRS 532.025(3) reads as follows:

> In all cases unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2) of this section is so found, the death penalty, or imprisonment for life without benefit of probation or parole, or the sentence of life without benefit of probation or parole until the defendant has served a minimum of 25 years of his sentence, shall not be imposed.

Jacobs, however, following Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990), changed the landscape. In Harris, the appellant argued he could not be sentenced to LWOP/25 because the jury had not found one of the "aggravating circumstances enumerated in KRS 532.025(2)(a)." This Court found Harris had "overlook[ed] the

[12] This Court's opinion in Jacobs was written before the General Assembly amended KRS 532.030 to include life without parole and KRS 532.025 to include a "domestic violence" aggravator. Even with these amendments, the same logic applies.

introductory language of that subsection," which authorized judge and jury to "consider 'any aggravating circumstance otherwise authorized by law.'" Harris, at 805.

In Jacobs, this Court held the last sentence of KRS 532.025(3) to have been "inartfully drafted" and having made this observation, negated it completely, stating: "[t]herefore, the jury's consideration of aggravating circumstances was not limited to one exactingly and specifically enumerated in this statute." Jacobs, at 420. This Court could only have meant that both judge and jury were authorized to consider non-statutory aggravating circumstances as well. Non-statutory aggravators are not "enumerated" in the statute and are "otherwise authorized by law."

This Court pointed out that a specific sentencing statute, KRS 532.030(1) governs capital offenses. That statute provides:

> [w]hen a person is convicted of a capital offense, punishment may be fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence. . . . KRS 532.030(1); Jacobs, at 420.

In the absence of the final sentence of KRS 532.025(3), combined with the continued applicability of KRS 532.030, the question "Are all murder defendants 'death eligible' post-Jacobs?" must be answered in the affirmative. The only circumstance making a person death-eligible in Kentucky is his conviction for murder. This is contrary to Tuilaepa, supra. See also Arave v. Creech, 507 U.S. 463, 474 (1993).

The final sentence of KRS 532.025(3) formerly would have limited the criteria for death eligibility to those aggravating circumstances set out in KRS 532.025(2). However, with the elimination of that subsection in Jacobs and the continued applicability of KRS 532.030, **every** defendant charged with a capital offense is "death eligible" even if **only**

non-statutory aggravation—a factor not "enumerated in KRS 532.025(2)—is present in the case. This runs afoul of the 8th and 14th Amendments and the prohibition against mandatory death sentences. See Woodson v. North Carolina, 428 U.S. 280 (1976).

**B. There Is Insufficient Statutory Guidance For Imposition Of The Death Penalty.**

A constitutionally mandated aspect of any procedure allowing for intentional taking of a life by the state is the sentencer must be given meaningful guidance. The sentencer must consider the character and record of the individual offender and the circumstances of the particular offense. Only through legislative guidance can there be an avoidance of "a substantial risk that [the death penalty] would be imposed in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153 (1976).

Because "death is a different kind of punishment from any other which may be imposed in the country," Gardner v. Florida, 430 U.S. 349, 357 (1977), the Supreme Court has mandated statutory schemes set up to allow the state to take life must provide for "a greater degree of reliability" in assessing death as punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). To ensure this "greater degree of reliability," the Supreme Court has gone to great pains to insist that the states which desire to impose the death penalty implement "procedures that safeguard against the arbitrary and capricious imposition of death sentences." Roberts v. Louisiana, 428 U.S. 325, 334 (1976).

The statutory scheme pursuant to which St. Clair was sentenced to death provides no standards to guide the sentencer "in its inevitable exercise of power to determine which murders [*sic*] shall live and which shall die." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

There are numerous problems with Kentucky's statute. It does not require the Indictment to charge a capital crime by charging the aggravators. (See Arg 30). It permits conviction and execution of the factually and legally innocent. It does not provide directions to the court and/or jury on how it should hear and resolve "additional evidence in extenuation, mitigation and aggravation of punishment." There are no directions providing which evidentiary standard shall be used in determining when mitigating factors exist. There is no guidance on how to weigh the mitigators against aggravators. For that matter, there is no requirement that mitigators and aggravators even be weighed against each other. There is absolutely no requirement that the judge or jury be required to make a finding regarding the existence of any mitigating factors.

Additionally, the statute may allow the prosecution to introduce, during the guilt or penalty phase, non-statutory factors which aggravate the sentence. The statute may limit consideration of the defendant's character and background to those mitigating circumstances specifically enumerated. The following mitigating circumstances are unconstitutionally vague: KRS 532.025(2)(b)(1) (What is a "significant history of prior criminal activity"?). KRS 532.025(b)(8) (Who is "young" and who is not young?)

Aggravators are vague as well, including KRS 532.025 (2)(a)(1), "The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has substantial history of serious assaultive criminal convictions." Some prosecutors have relied upon the aggravator in KRS 532.025(2)(a)(2), ("The offense of murder . . . was committed while the offender was engaged in the commission of arson in the first degree"), in fact situations where the state alleges the defendant started a fire for the purpose of

obliterating evidence, after the victim was already dead, and where there is no allegation the person died during the fire.

Additionally, KRS 532.025(2)(a)(3), popularly known as the "Oklahoma City bombing aggravator", is unconstitutionally vague and overbroad. Because of this vagueness and overbreadth, one particular prosecutor actually gave notice of intent to seek death on the ground a simple handgun, used during a drug deal shooting, was 'a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one (1) person'. Other prosecutors certainly would not take that position. Such an application is certainly not the requisite narrowing of the class of persons eligible for the death penalty, since such application would mean that every single murder with a handgun would be a death case.

If KRS 532.025(2)(a)(7), the "police officer aggravator", were to be construed to allow a death sentence against someone who did not know that the victim was a public official or a law enforcement officer, then that statute, too, would be vague and overbroad. The circuit court in another case ruled just that way. Similarly, if KRS 532.025(2)(a)(8) were to be construed to allow a death sentence against someone who was not aware that an EPO or DVO was in effect, then it, too, would be unconstitutionally overbroad. Finally, the Kentucky statute authorizes a death sentence without a finding of specific intent to kill.

That such crucial and outcome-determinative questions remain unanswered under KRS 532.025 establishes the lack of proper guidance to determine [who] shall die. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). As such, any penalty of death

imposed under such an infirm scheme cannot be carried out under the 5th, 6th, 8th, 14th Amends., US Const.;§2, 7, 11, 17, KY Const.

**C. The Death Penalty As Applied In Kentucky Is Discriminatory.**

Furman v. Georgia, 408 U.S. 238, 310 (1972) held the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." The weakness exposed in Furman was the death penalty was "wantonly" and "freakishly" imposed. The arbitrariness and discrimination which the Court found in Furman continues to exist in Kentucky, notwithstanding more than 30 years of supposed "guided discretion."

The Supreme Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), does not foreclose this claim that the death penalty in Kentucky is arbitrarily applied, in view of Kentucky's required statutory review. Furman's holding that the death penalty may not be wantonly or freakishly applied remains valid.

Nothing is more offensive to constitutional principles than for a citizen to be selected for death because of his race or that of the victim. Yet, race is a predictor of the outcome in death penalty cases. Studies proving this has been the Kentucky experience, were scrutinized by the U.S. General Accounting Office (GAO), as to their methodology and then were approved for inclusion in a 1990 Report to the Senate and House Committees on the Judiciary as to whether race of either the victim or the defendant influences the likelihood defendants will be sentenced to death. The research on Kentucky's experience found that, between December 22, 1976, and December 31, 1991:

> Blacks accused of killing Whites had a higher than average probability of being charged with a capital crime (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders. This finding remains after taking into account the effects of differences in the heinousness of the

> murder, prior criminal record, the offender, and the probability that the accused will not stand trial for a capital offense. Kentucky's "guided discretion" system of capital sentencing has failed to eliminate race as a factor in this process.

Keil, Thomas and Gennaro F. Vito, "Race and the Death Penalty in Kentucky Murder Trials: 1976-1991", American Journal of Criminal Justice, Vol. 20, No.1, (1995); "Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing Research Indicates Pattern of Racial Disparities", US GAO, February 1990, citing Keil and Vito, "Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes," Justice Quarterly, Vol. 7, No., 1, (March 1990); Keil and Vito, "Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale", Criminology, Vol. 27, No. 3 (1989); and Vito and Keil, "Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period," The Journal of Criminal Law & Criminology, Vol. 79, No. 2, (Summer 1988). Of the 39 persons currently on death row, 23% are black or Hispanic while those groups comprise only 9.5% of the state's population.

Race is not a permissible basis on which to decide who lives and who dies. A death penalty scheme is unconstitutional if it allows race to be so used, because race is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," Furman, supra, at 313; Turner v. Murray, 476 U.S. 28, 35-36 (1986). See also §§ 1, 2, 3, 17, KY Constitution; KRS 532.300. Because our capital punishment scheme is unable to eliminate this racial bias, and because even the Supreme Court has virtually conceded that fairness and rationality cannot be achieved in the administration of the death penalty, our capital punishment scheme is unconstitutional. McClesky v. Kemp, 481 US. at 279, 313, note 37.

In addition to race, there is a strong prejudice shown in regard to the gender of the defendant. As of June 30, 2007 there were 49 women on death row (NAACP Legal Defense Fund). This constitutes 1.4% of the total death row population of about 3,444 persons and less than 0.1% of the approximately 50,000 women in prisons in the United States. Since 1976, 11 women have been executed in the U.S.[13]

This Court has a duty to review whether the death penalty was imposed arbitrarily. KRS 532.075(3)(a). The race of the victim and the gender of the accused and victim are impermissibly arbitrary bases for determining who should receive the ultimate penalty. 5th, 6th, 8th, 14th Amends., US Const. ; §1, 2, 3, 7, 11, 17, 26, KY Const.

**D. Prosecutorial Discretion Makes Arbitrariness Inherent.**

This Court can take judicial notice that most capital indictments are resolved by a plea. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the cases in which it is not...." Furman, supra.

Prosecutors have unlimited discretion whether to seek death in a given case. There are no statewide guidelines and no procedures for pretrial judicial review of the prosecutorial decision in contrast to the practice in other states. See State v. Watson, 312 S.E.2d 448, 451-52 (NC 1984); State v. McCrary, 478 A.2d 339 (NJ 1984); Ghent v. Superior Court, 153 Cal.Rptr. 720, 727-28 (Cal App 1979). When the vast majority of capital indictments are plea bargained, that decision represents the most important decision in the sentencing process. Nowhere in Kentucky's legal system is there more

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[13] Source: Death Penalty Information Center, http:\\deathpenaltyinformationcenter.org.

absolute and arbitrary power over the lives and liberty of criminal defendants than in the prosecutor's authority to plea bargain a capital indictment downward.

Of the 38 men and 1 woman who currently reside on Kentucky's death row, 17 (44%) came from two counties. The decision to impose the death sentence depends not just on what crime has been committed, but on which side of the street the defendant happened to be standing. Kentucky has 60 judicial districts and 60 prosecutor/decision makers, each with different values, motivations and influences. Indeed, one Kentucky prosecutor has decided that his religious convictions prevent him from prosecuting a capital case.[14] With no requirement to examine both sides of the "scale," no uniform standards to guide the decision-making process and no judicial check on the prosecutor's discretion, the selection of who will be subject to capital prosecution is influenced by diverse political factors which cause the system as a whole to be arbitrary and capricious. 5th, 6th, 8th, 14th Amends., US Const.; § 1, 2, 3, 7, 11, 17, 26, KY Const.

**E. There Is A Danger Of Executing The Innocent.**

There is a growing awareness of an unacceptably high rate of wrongful conviction in capital cases. At least 124 persons have been freed from death sentences after evidence of their innocence emerged. Of that total, nearly 43% were on death row anywhere from 10 to 33 years before this happened.[15] There is no way to tell how many of the 1089 people executed since 1976 also may have been innocent. See Herrera v. Collins, 506 U.S. 390, 417-418 (1992). There are "serious questions" about whether the death penalty is being fairly administered in the United States. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed," Supreme Court

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[14] Source: Death Penalty Information Center.
[15] *Id.*

Justice Sandra Day O'Connor said in a Minnesota speech. *Minneapolis Star Tribune*, 7/3/01. The Furman demand that the government fix the arbitrariness and capriciousness of death sentencing has not been realized. Instead, Justice White's premonition in his concurrence in Gregg v. Georgia, supra at 226, that "[m]istakes will be made and discriminations will occur which will be difficult to explain," has come true. The fallibility of the death machinery is no longer a matter of mere speculation; it is a proven fact. Such mistakes require this Court to hold our death penalty scheme unconstitutional. 5th, 6th, 8th and 14th Amends., US Const. and § 1, 2, 3, 7, 11, 17, 26, KY Const.

**F. Conclusion.**

One reason capital punishment gets meted out in an arbitrary, capricious and disproportionate way is the rules, which have evolved in an ostensible attempt at achieving rationality in these cases, are so complicated and confusing that decisions end up being made on some more simple basis, outside the rules. Flamer v. Delaware, 68 F.3d 736, 772 (3rd Cir., 1995) (Judges Lewis, Mansmann, and McKee dissenting).

The complexity of the capital punishment system has rendered that system unreliable to validly decide who should live and who should die. It has also made the process so cumbersome and time-consuming that, as we slog through years of complicated appellate and post-conviction procedures, the condemned person is subjected to the cruelty, inhumanity, and degradation of suffering many years under sentence of death. That condition is itself an unconstitutional punishment. See Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Justice Stevens respecting denial of certiorari); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting); Knight v. Florida, 120 S.Ct. 459, 462-463 (1999) (Breyer, J., dissenting from denial of certiorari).

Former Supreme Court Justice Blackmun was "morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can save the death penalty from its inherent constitutional deficiencies." Callins v. Collins, 510 U.S. 1141 (1994), (Blackmun, J., dissenting). The "inherent constitutional deficiencies" include our inability to reconcile the competing constitutional requirements of across-the-board rationality and consistency and fairness and individualized sentencing, which is exacerbated by the fact that the federal courts have been hamstrung by Congress, (see, the federal Anti-Terrorism and Effective Death Penalty Act), and the Supreme Court itself, (see, Teague v. Lane, 489 U.S. 288 (1989); McCleskey v. Kemp, supra; Herrera v. Collins, supra.; and Coleman v. Thompson, 501 U.S. 722 (1991)), from being effective forums for remedying federal constitutional errors.

In a dissenting opinion in Moore v. Parker, 425 F.3d 250, 268-270 (6th Cir.2005), Judge Martin summed up many of the constitutional problems with the death penalty. Based on his 25 years on the 6th Circuit and his review of many death cases, he concluded "only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair. . . .[L]est there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce." Id. This Court should conclude, like Judge Martin, that the death penalty is a farce and that it is unconstitutional for all of the reasons stated above. Because it is unconstitutional, St. Clair's death sentence must be reversed. 5th, 6th, 8th and 14th Amends., US Const. and § 1, 2, 3, 7, 11, 17, 26, KY Const.

## 33. Method of Proportionality Review And Denial Of Access To Data.

Proportionality review is part of the review mandated by KRS 532.075.

### A. Proportionality Review As Conducted By This Court is Flawed.

Kentucky, through its death penalty statutes, has set up a proportionality review process. KRS 532.075(3)(c). Once such a review is established by state statute, it must be applied constitutionally to comport with due process. Greer v. Mitchell, 264 F.3d 663, 691 (6th Cir. 2001). In Evitts v. Lucey, 469 U.S. 387, 401 (1985), the Court said "when a state opts to act in a field where its actions have significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and in particular, in accord with the Due Process Clause." Accord Olim v. Wakinekona, 461 U.S. 238 (1983); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981); Hicks v. Oklahoma, 447 U.S. 343 (1980); Ford v. Wainwright, 477 U.S. 399 (1986).

Under KRS 532.075(l), "[w]henever the death penalty is imposed for a capital offense. . . .the sentence shall be reviewed on the record by the Supreme Court." "With regard to the sentence, the court shall determine. . . .[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3)(c). The problem with Kentucky's review process is this Court does not compare cases in which the death penalty was imposed to "the penalty imposed in similar cases." This Court's universe has been limited solely to those cases in which the death penalty was imposed; not to other "similar cases" in which death was not imposed. It is also limited to only those cases which have been affirmed on appeal. Halvorsen v. Commonwealth, 730 S.W.2d 921, 928 (Ky. 1987).

The constitutional flaw in this Court's review is that despite having ready access to other cases through its own records in which the aggravator was accompanying felonies, but where a death sentence was not returned, it fails to take those particular "similar cases" into consideration. As such, not only is this Court's scope unconstitutionally limited, but the entire procedure mandates a finding of proportionality. It renders the review process meaningless in violation of the Due Process Clause and the 8th Amendment. As noted in Argument 29, a comparison of St. Clair's case to other similar cases in which death was not imposed could lead this Court to a very different conclusion about the appropriateness of his death sentence.

North Carolina has a similar proportionality review statute. See State v. Young, 325 S.E.2d 181 (N.C. 1985). In carrying out its proportionality review, however, the North Carolina Supreme Court recognizes it cannot examine only cases in which the death penalty was returned. Accordingly, in carrying out its review, it compares the death penalty case before it with all cases that it has reviewed on appeal containing the same factual predicate whether the death penalty was imposed or not.

Likewise, New Jersey has a proportionality review statute. In State v. Loftin, 724 A.2d 129 (N.J. 1999), the New Jersey Supreme Court articulated its analysis of the various proportionality review processes used by other courts to determine which method it should adopt. In dismissing the process used by Kentucky, of limiting the scope of those cases reviewed only to other cases in which the death penalty was actually imposed, the court proclaimed such review "inadequate." Id. at 146. The court concluded "it was self-evident that the universe for proportionality review must, at a minimum, include all penalty-trial cases [i.e. those similar cases in which a penalty phase

was conducted].” Id. at 146 (citations omitted). Ultimately the New Jersey court chose to include all death-eligible homicides (even those in which the death penalty was not sought by the prosecution) in the statistical universe of their proportionality review, stating, “[W]e determined that our mandate to prevent arbitrariness in death sentencing should extend to review of prosecutorial decisions whether to seek the death penalty.” Id. at 146 (citations omitted). See also State v. Cooper, 731 A.2d 1000 (N.J. 1999).

Due process demands that this Court expand its universe to all similar cases, whether death was imposed or not, so that there can be a meaningful proportionality review of St. Clair’s death sentence. See Correll v. Commonwealth, 352 S.E.2d 352, 360-361 (Va. 1987) (“similar cases” include “all capital cases presented to this court under the current capital-murder statutes, including those in which life sentences were imposed”); Harvey v State, 682 P.2d 1384, 1385 (Nev. 1984) (“similar cases” include “all capital cases, as well as appealed murder cases in which the death penalty was sought but not imposed”). See also White v. State, 81 A.2d 201, 212-215 (Md. 1984); State v. Jeffries, 132 717 P.2d 722, 740 (Wash. 1986); State v. Neal, 796 So.2d. 649 (La. 2001).

When conducting proportionality review in Young, supra, the North Carolina Supreme Court recognized in 26 cases involving murder during the course of a robbery, jurors returned death verdicts only 3 times. Accordingly, it held the sentence of death for Young was disproportionate. Yet, if this Court were reviewing the same case, it would have only compared the death sentence on review to those 3 cases in which the death penalty was returned and, of course, found the sentence proportionate. The Kentucky proportionality review process simply ensures a death sentence will **always** be found proportionate as long as there has been one other death penalty appeal with an identical

aggravating factor. This is clearly not "in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, supra.

Finally, "[i]n order to ensure that a death sentence has not been arbitrarily or capriciously imposed, the states must provide 'meaningful appellate review.'" Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Parker v. Dugger, 498 U.S. 308, 321 (1991). ("[M]eaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime.'" (citation omitted) (original emphasis)). Kentucky's proportionality review, which is an integral part of the appellate review of a death sentence does not perform this function, although the statute requires this Court to evaluate "similar cases, considering **both the crime and defendant**." KRS 532.075(3)(c) (emphasis added). This Court compares and analyzes only the nature of the crimes and aggravators involved.

Despite the mandates of KRS 532.075, in none of the published opinions of this Court has there been any discussion of the defendant's background and character as having a bearing on the proportionality of the sentence of death. That this is a part of the proportionality review has been noted, but no analysis has been provided. See, e.g., Woodall v. Commonwealth, 63 S.W.3d 104, 133 (Ky. 2001) By way of contrast, Florida, which has judge sentencing based on a jury recommendation, requires the trial court to specify the mitigating as well as the aggravating circumstances that were found to be present in the case, and the Florida Supreme Court has relied upon these findings to reverse numerous death sentences on proportionality grounds.[16] The failure to consider

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[16] See, e.g., State v. Fitzpatrick, 527 So.2d 809 (Fla. 1988); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990); Hegwood v. State,

the "nature of the defendant" as well as the circumstances of the crime for proportionality review does not comport with the "fundamental respect for humanity underlying the Eighth Amendment." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

**B. Inability To Obtain Access To KRS 532.075(6) Data.**

Access to this data is imperative because decisions about the appropriateness of St. Clair's death sentence will be made without disclosure of vital information and without the participation of counsel or argument of any kind. This offends the 6th, 8th, 14th Amends., US Const. See Gardner v. Florida, 430 U.S. 349, 360 (1977); Harris by and through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1286-91 (W.D.Wash. 1994). Indeed, KRS 532.075(4), states a defendant sentenced to death "shall have the right to submit briefs...and to present oral argument to the court." That statute requires this Court to reference similar cases and gives this Court the authority to set aside and remand the case for resentencing "based on the record and argument of counsel" with regard to disproportionality. KRS 532.075(5)(b). It is impossible to do that in a vacuum. St. Clair is indigent and unable to collect complete records of all previous actual or potential death penalty cases. Therefore, he also has been denied equal protection of the law. See Griffin v. Illinois, 351 U.S. 12 (1956).

**34. Death Qualification Of Jurors Is Unconstitutional.**

Unpreserved. The process of death qualification offends basic principles of justice. Notwithstanding Lockhart v. McCree, 476 U.S. 162 (1986), Buchanan v. Kentucky, 483 U.S. 402 (1987), and Wilson v. Commonwealth, 836 S.W.2d 872, 890

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575 So.2d 170 (Fla. 1990); Downs v. State, 574 So.2d 1095 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Lucas v. State, 568 So.2d 18 (Fla. 1990); McKinney v. State, 579 So.2d 80 (Fla. 1991).

(Ky. 1992), the process of death qualification violates fundamental guarantees of equal protection and due process, and denies a defendant a representative jury of his peers. 5th, 6th, 8th, 14th Amends., US Const.; §§ 2, 3, 7, 11, 17, 26, Ky.Const. The excusal for cause of 9 prospective jurors because of their beliefs on the death penalty violated these constitutional provisions. TE 3 214 – 221; TE 4 309 – 326; TE 6 153 – 160, 257 – 268; TE 7 361 – 385; TE 8 3 – 18; TE 9 161 – 172, 200 – 207, 282 - 289. For the reasons argued in Buchanan and the dissent in Lockhart, supra at 184-188, this Court should bar or limit this religious/philosophical/political litmus test-this pledge of allegiance to death-which has no place in the American courtroom. St. Clair requests a new sentencing trial.

**35. Residual Doubt Bars Death Sentence.**

Residual doubts about a capital defendant's moral culpability can be considered and can legitimately support a sentence less than death. Lockhart v. McCree, 476 US 162, 181-182 (1986). This Court implicitly acknowledged the existence of a genuine, if not reasonable, doubt about guilt is a proper and necessary factor to consider in determining whether death is appropriate by inclusion of item C(11) in the trial judge's report, asking whether the evidence "forecloses all doubt respecting the defendant's guilt?". In response to this question, the trial judge responded the evidence did not foreclose all doubt. RTJ §C(11). Indeed, there is a serious doubt as to St. Clair's guilt. Because a jury verdict and the truth are not unerringly synonymous and a genuine doubt exists about St. Clair's guilt, imposition of a death sentence violates the 8th, 14th Amends., US Const.; § 2, 3, 11, 17, 26, KY Const. At a minimum, this Court should reduce St. Clair's death sentence to life imprisonment.

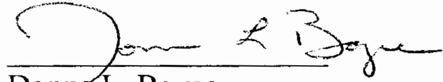
**36. Cumulative Error.**

Assuming this Court does not find any individual issue sufficient to require reversal, the cumulative effect of the preceding errors render St. Clair's death sentence arbitrary and require it be set aside. Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1993); Sanborn v. Commonwealth, 754 S.W.2d 534, 542 – 549 (Ky. 1988). The cumulative effect of these errors denied his right to a fair and rational sentencing hearing, leading to his death sentence. The 5th, 6th, 8th and 14th Amends., US Const., and §§ 1, 2, 3, 7, 11, 17, 26, KY Const., require his death sentence be set aside and the case remanded for a new sentencing hearing in which the death sentence is not an option.

## Conclusion

The judgment of the Bullitt Circuit Court should be reversed.

Respectfully submitted,



Donna L. Boyce
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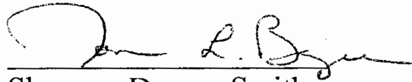

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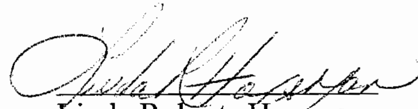

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