

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

FILED

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APPELLANT

MICHAEL ST. CLAIR

v.

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

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT

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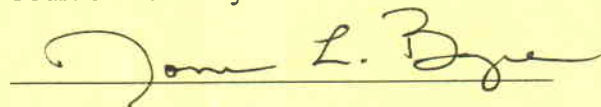
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply 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, 1024 Capital Center Dr., Frankfort, KY 40601; Hon. Dana Todd, 315 W. Main St., Frankfort, KY 40601; Hon. Steve Mirkin, Trial Counsel, 39 Public Square, Elizabethtown, KY 42701; Hon. James Gibson, Jr., Trial Counsel, DPA, PO Box 6570, Shepherdsville, KY 40165; and Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on September 29, 2008. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.



PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond as necessary to the arguments made in the Brief for Appellee.

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Arguments

1. No Hearing Regarding Hybrid Counsel

An affirmative duty to hold a *Faretta* hearing is imposed on the court when an accused attempts to make any waiver of the right to counsel. Hill v. Com., 125 S.W.3d 221, 226 (Ky. 2004). When a defendant makes the request to proceed *pro se* or for hybrid representation, the principles of *Faretta*, which require the court to hold a hearing in which the defendant testifies on the question of whether the limited waiver of counsel is voluntary, knowing and intelligent, become applicable. US Const. § 11. St. Clair assumed the core functions of an attorney by filing numerous *pro se* motions. St. Clair argued many of these motions before the court and the court ruled on the motions. No *Faretta* hearing was ever held. The following actions established St. Clair's role as hybrid counsel:

- (1) St. Clair's numerous *pro se* motions;
- (2) Trial court's permission for St. Clair to argue the motions after it explicitly said any further *pro se* motions would not be docketed;
- (3) Trial court's inquiry to defense counsel whether the counsel would argue the motion or whether St. Clair would argue it;
- (4) Defense attorneys response that St. Clair would argue the motion as it was his motion;
- (5) St. Clair's explicit statement to the court that he had to act *pro se* because a capital case "calls for more [attorney] help;"
- (6) St. Clair's motion to be lead counsel (although withdrawn, it indicated he only had two options—lead counsel or co-counsel), and
- (7) St. Clair's motion to release his attorneys (this motion was partly based on St. Clair having to file so many motions himself).

In Hill, *supra*, this Court found the trial court still has *Faretta* duties even when there is a limited waiver of counsel. See U.S v. Turnbull, 888 F.2d 636, 638 (9th Cir.1989) ("If the defendant assumes any of the 'core functions' of the lawyer, however, the hybrid scheme is acceptable only if the defendant has voluntarily waived counsel.") (Citations omitted.); U.S. v. Davis, 269 F.3d 514, 520 (5th Cir.2001) ("Standby assistance of counsel, however, does not satisfy the Sixth Amendment right to counsel."). Professors LaFave, Israel, and King concur, noting "since hybrid representation is in part *pro se* representation, allowing it

without a proper *Faretta* inquiry can create constitutional difficulties.” LaFave, Israel & King, *Criminal Procedure* § 11.5(g) (2d ed. Supp.2003).

An examination of St. Clair’s actions shows he was acting as hybrid counsel. St. Clair first informed the court he wanted to act as lead counsel, and then later withdrew that motion. TR I 118. In a written order, the court provided, “It was agreed by counsel for the Commonwealth and counsel for the Defendant, along with the Defendant personally, that no further Pro Se motions would be filed by the Defendant or considered by the Court and, that if any Pro Se motions are filed, they should be directed to counsel for the Defendant.” TR I 131. Even though the court stated it would no longer accept *pro se* pleadings from St. Clair, it continued to do so. It not only continued to accept the pleadings, it allowed St. Clair to substantively argue some of them. TE 1 33. Even the prosecutor asked the court to take some action on what St. Clair’s role was going to be. TH 8/11/05 11-12. When a prosecutor inquires as to what role St. Clair was going to play in the trial, the defendant repeatedly files *pro se* motions including one designating himself as lead counsel, and the court continues to address the *pro se* motions substantively, a *Faretta* hearing should be held and the defendant should be informed of the dangers of self-representation.

The trial court should not be allowed to avoid informing a defendant of the dangers of self representation on one hand, and yet continue to allow the defendant to argue substantive *pro se* motions on the other hand. St. Clair filed at least 14 *pro se* motions. 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.” Davis, supra; Turnbull, supra.

Here, the court never conducted any type of colloquy with St. Clair to make sure he understood what he was doing and made no finding his limited waiver of counsel was knowing, intelligent, and voluntary. 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.

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

In its introductory response to this issue, the appellee declares "the right of the Commonwealth to introduce St. Clair's prior testimony was absolute and unconditional." Brief for Appellee at 16-17. Not surprisingly, the sole authority proffered for this proclamation is trial/appellate counsel Smith. Grandiosity is no substitute for a meaningful response to the issue or citation to recognized legal authority.

A. Lack of notice. The appellee offers this Court misdirection rather than a response to the issue actually raised. The appellee's claims to the contrary, this issue is not about any claim St. Clair or his counsel were surprised to learn he testified at his first trial, a claim of right to a witness list, a claim St. Clair's prior testimony was somehow a witness summary or a claim the court required St. Clair's testimony be presented in summary form. What is this issue actually about? The court ordered "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. In meetings and hearings held from July to mid-August 2005, it was resolved the prosecution wished to call ten named witnesses live and present the remaining witnesses from the first trial by summary. TH 8/10/05 100-128; TE 18 173-181. At no time in any of these discussions, or at any hearing before the court (until August 24th), did the prosecution make any reference to possibly introducing St. Clair's guilt phase testimony. The defense relied upon the prosecution's representations as to which witnesses it intended to present live and/or 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 court's order. In sum, the defense was misled until the close of the third day of evidence. 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, it would have cross-examined several witnesses differently and more extensively, and it would have conducted individual voir dire differently.

B. Refusal to redact. While the prosecutor's *ad hoc* redaction procedure was a problem, the appellee fails to address the larger problem. St. Clair's previous testimony primarily dealt with his alibi defense and explanations of physical evidence. These were not in issue at the resentencing and the prosecutor failed to show any relevance to support their introduction. The defense also unsuccessfully argued the court should exclude references to Scott Kincaid, Jeff Libby, the testimony of ByLynn St. Clair Van Zandt and the search of T.J. Frost's barn. The testimony as read to the jury, even with the prosecutor's *ad hoc* redactions, contained numerous references to, and attempted rebuttals of, witnesses and testimony never heard in any form by the resentencing jury. The appellee's failure to address the substance of this critical part of the issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

Sherley v. Com., 889 S.W.2d 794, 798 (Ky. 1994) is inapposite as it only authorized the reading of a defendant's guilt phase testimony at a retrial on the issue of guilt. Sherley simply does not address the question of whether a defendant's guilt phase testimony can be read at a re-trial on the limited question of sentencing. "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); Kormondy v. State, 703 So.2d 454, 463 (Fla.1997). The problem with St. Clair's prior testimony is much of it was not relevant and should have been redacted. KRE 401;

KRE 402. 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

3. Penalty Phase Instructions Denied Reliable Capital Sentencing.

The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). The appellee notes 4 subsections (D, G, H and I) are unpreserved and, thus, unreviewable. This argument ignores well-established law to the contrary. Unpreserved errors are reviewable where the death penalty has been imposed. KRS 532.075(2); Rogers v. Com., 992 S.W.2d 183, 187 (Ky. 1999); Perdue v. Com., 916 S.W.2d 148, 153-154 (Ky. 1995). The rationale for this rule is a death sentence is unlike all other sanctions. Rogers, supra (citing Cosby v. Com., Ky., 776 S.W.2d 367 (1989), citing Beck v. Alabama, 447 U.S. 625 (1980)). Accordingly, the invocation of the death penalty requires greater caution and reliability than is normally necessary in the criminal justice process. Id. Every allegation of error in this argument should be reviewed in this context. 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 the case at bar, there is no reasonable justification or explanation for counsels' failure to object to any of these four sub-sections, e.g., counsels' failure could in no way have been a legitimate trial tactic. These four sub-sections were prejudicial, i.e., without these instructional errors St. Clair may not have been sentenced to death. Perdue, supra. Each of these sub-sections should be fully reviewed along with the preserved sub-sections and that review should lead to reversal.

4. Unconstitutionally Vague Aggravator.

The appellee's failure to address the substance of this issue should be taken as a concession of error. See CR 76.12(8)(c). The appellee's sole response is the law of the case doctrine bars review. However, this Court has long recognized "[w]here the law of the case

rule is applicable, it has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous.” Gossett v. Com., 441 S.W.2d 117, 118 (Ky. 1969). Hutson v. Com., 215 S.W.3d 708, 715 (Ky. App. 2007), acknowledged the continued viability of this exception. The application of this exception here is particularly appropriate and compelling. See Brief for Appellant at 24 – 25.

5. Denial of Directed Verdict Of Acquittal On Aggravator.

The appellee’s failure to address the substance of this issue should be taken as a concession of error. CR 76.12(8)(c). The appellee claims the law of the case doctrine bars review. This ignores the reality that directed verdict issues are largely factual. As was held in Hutson, supra at 715, the appellee’s

...desire to stretch the law of the case doctrine to also make the facts of the case immutable might well reduce the workload of this court, but it would fail to serve the ends of justice. In a proper case the doctrines of estoppel or issue preclusion might require that the facts remain static on remand, but the law of the case doctrine will not make them so. The doctrine is simply inapplicable here and [the] argument necessarily fails.

If this Court considers this issue to be a legal rather than factual issue, Appellant refers this Court to his reply to Argument 4, supra.

6. Prosecutorial Misconduct

A. Opening Statement. The appellee’s failure to address the substance of this issue should be taken as a concession of error. CR 76.12(8)(c). While the court did give an admonition to disregard the “serial killer” argument of the prosecutor, it could not cure the prejudice that had already occurred. “Admonitions of the trial court often provide a rather impotent antidote for poison already injected.” Shawhan v. Com., 318 S.W.2d 541 (Ky. 1958). Admittedly, “[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.” Johnson v. Com., 105 S.W.3d 430, 441 (Ky. 2003).

However, this Court has recognized two exceptions to this rule: when there is an overwhelming probability the jury will be unable to follow the court's admonition and a strong likelihood the effect of the inadmissible evidence would be devastating to the defendant; or when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial." Johnson at 441. In this case, there was an overwhelming probability the jury would be unable to follow the court's admonition. The jury was empanelled for a resentencing trial. For the Commonwealth to start the trial by telling the jury St.Clair was a serial killer was devastating to the defense. It is highly unlikely the jury would simply disregard this ominous and emotionally laden term.

B. Improper Bolstering. The appellee's failure to address the substance of this issue should be taken as a concession of error. CR 76.12(8)(c). This issue is preserved by defense counsel's objection. The line of questioning inquiring of Reese whether he knew Smith, Todd or Wright was irrelevant, prejudicial and improper. The only logical inference was to establish these prosecutors would have never agreed for Reese to escape the death penalty. A prosecutor cannot testify through questions. The Commonwealth should not be allowed to offer a deal to a crucial witness to escape death on one hand, and then turn around and distance themselves from that very deal on the other hand.

C. Improper Comments Regarding Special Prosecutor's Office. The appellee's **complete** failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

D. Improper Question Beyond Scope of Redirect Examination. Although a specific monetary amount may not have been elicited from Dr. Caruso, the fact he charged more for testifying than for seeing private patients was brought out and emphasized by the prosecution. TE 16 271-275. Even if Dr. Caruso had previously been questioned about the percentage of his time devoted to private versus forensic versus governmental practice, this

line of questioning had nothing to do with the amounts he charged for the different practices. Eliciting that the defense expert was charging more (and charging the taxpayers) for testifying for St. Clair only served to prejudice the jurors against him.

“We are only asking for death.” The appellee’s failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

E. Closing Argument.

“If not this case then what case?” The appellee’s failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). This Court has condemned such an argument. “The remarks of a Commonwealth’s Attorney to cajole or coerce a jury to reach a verdict is error. Lycans v. Com., 562 S.W.2d 303, 306 (Ky. 1978); Dean v. Com., 777 S.W.2d 900 (Ky. 1989).

Serial Killer. The prosecutor’s references to St.Clair being a “serial killer,” “super serial killer” and a “serial killer to the second power” and an “elite serial killer” constitute improper prosecutorial vilification of the accused. Sanborn v. Com., 754 S.W.2d 534 (Ky.1988); Johnson v. Com., 302 S.W.2d 585 (Ky.1957) .

Misstatement of Evidence. The appellee’s failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). Informing the jury the medical examiner testified Brady’s head was bowed was simply incorrect. This argument was designed to inflame the passions of the jury.

Golden Rule Argument. A ‘golden rule’ argument is one in which the prosecutor asks jurors to place themselves in the victim’s position.” Lycans v. Com., 562 S.W.2d 303, 305-06 (Ky.1978). Appellee asserts he did not ask the jurors to put themselves in the place of the victim, rather he only asked them to imagine what was going through Brady’s mind. Appellee Brief, p. 39. This is a distinction without a difference. This Court has long forbidden litigants from asking jurors to place themselves in the shoes of a victim and asking

them to imagine they are the victim. Stanley v. Ellegood, 382 S.W.2d 572, 575 (Ky. 1964) reversed a civil case for statements that, while improper, were shorter and less inflammatory than the improper argument delivered in this case. Lycans v. Com., 562 S.W.2d 303, 306 (Ky. 1978) held Golden Rule arguments were improper in criminal cases as well as in civil cases.

I am here to speak on behalf of Frank Brady. The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). Appellee states "[t]here is nothing improper about a prosecutor saying during summation to the jury that he is speaking for the victim." Appellee Brief, p. 39. Appellee cites no supporting authority for this proposition. In Thompson v. Com., 147 S.W.3d 22, 46 (Ky.2004), this Court stated the Commonwealth should not imply it was acting on behalf of victims, since its duty is to represent the Commonwealth. Thompson concluded the Commonwealth's statement it was representing the victim approached the "line of impropriety" but still fell within the latitude of acceptable closing argument. Id. Here, unlike Thompson, the prosecutor's statements reached the 'line of impropriety' and crossed it.

My Wife and I Teach Sunday School. The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

When the opposing team is making a run. Contrary to Appellee's assertion, Appellant is not embellishing the transcript. It is true none of the three appellate lawyers attended the trial. Fortunately, the court reporter was in attendance. As can be seen by the official transcript, Smith was addressing the jury when he made the improper comment.

THE COURT:
MIRKIN:
(RETURNING TO OPEN COURT)
COMMONWEALTH/ SMITH:

Objection is overruled.
Thank you.

When the opposing team is making a run you call a time-out. TE 24 36.

Prosecutor's adjustment of hat. Appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

7. The Governors' Executive Agreement.

There is an important reason the Commonwealth wishes this Court to determine the agreement between the governors of Oklahoma and Kentucky under which St. Clair would be imprisoned in an underground prison in Oklahoma if he were not sentenced to death in Kentucky was not mitigating evidence. That reason is if this Court determines that the agreement constituted mitigating evidence and the jurors were informed of the agreement, it is likely they would have given him a sentence less than death, knowing his chances of escaping from the underground Oklahoma facility were nil. This displays the Commonwealth's motivation—vengeance, not justice.

Haight v. Com., 734 S.W.2d 436 (Ky. 2001) considered whether plea offers made prior to trial should be considered mitigating evidence. This Court held sentencing determinations are the province of the jury and expressed reservations about informing them of the prosecutor's recommended sentence, theorizing the jury might be swayed by the prosecutor's offer. However, while the jury determines the sentence, the executive branch determines where that sentence will be served. Thus, the agreement did not broach the jury's province as the jury has no say in where a sentence will be served.

The Commonwealth next ridiculously asserts a negotiated, written, executed contract between the executives of the state of Oklahoma and the Commonwealth of Kentucky could be "mutually rescinded or altered at any time." Detrimental reliance by a party to the terms of an agreement provides a basis for enforcing the agreement. Black's Law Dictionary defines "detrimental reliance" as "reliance by one party on the acts or representations of another, causing a worsening of the first party's position. Detrimental reliance may serve as a substitute for consideration and thus make a promise enforceable as a contract." Both

parties to the agreement gave consideration; had the jury given St. Clair a life sentence, the Commonwealth would have given up imprisoning a violator of its laws and Oklahoma gave up the same right if a death sentence was secured in Kentucky. This was a bargained-for, arms-length enforceable agreement and the Commonwealth's suggestion that the paper it was written on was tantamount to toilet paper is ridiculous.

8. Improper Limits Placed On Individual Voir Dire.

The Commonwealth fails to address the specific errors alleged here. It instead insists this Court's Opinion in *St. Clair I*, 140 S.W.3d 510 (Ky. 2004), represents the "law of the case" and the Court cannot again consider this issue. However, this time we are concerned with new jurors, new questions, and new rulings. This Court stated the following concerning voir dire issues raised in *St. Clair I*:

Appellant submits a list of topics upon which he attempted to question prospective jurors but was prevented from doing so when the trial court sustained objections from the Commonwealth. We find that "the trial court properly curtailed questions that were not proper and only confused the panel." *Furnish*, 95 S.W.3d at 44. The trial court was well within its discretion to prohibit Appellant from repeating questions already posed by the trial court, *Woodall*, 63 S.W.3d at 118, inquiring generally how prospective jurors "felt about the death penalty," *Id.* at 117, what they considered a "proper case" for the death penalty, *Hodge*, 17 S.W.3d at 839, and whether they believed fewer "heinous crimes" would occur if the death penalty were employed more often. *Woodall*, 63 S.W.3d at 117. "The mere fact that more detailed questioning might have somehow helped the accused in exercising peremptory challenges does not suffice to show abuse of the discretion in conducting the examination." *Id.* at 116. Here, "[b]oth parties were able to thoroughly voir dire the panel[.]" *Furnish*, 95 S.W.3d at 44, and we find no error in the trial court's rulings as to the scope of individual voir dire questioning. *Id.* at 534.

The error presented here is *St. Clair* wasn't able to voir dire jurors concerning whether they could properly consider all mitigating evidence (*Hines*), which was not addressed by this Court in *St. Clair I*. One juror expressed reservations about considering the entire range of penalty (*Botos*) and counsel was not permitted to inquire further about her concerns. The same with juror *Massey*. Again, the trial court prevented counsel from fully vetting the juror. The "law of the case" doctrine does not apply here because these are disparate issues.

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

As trial counsel astutely pointed out the prosecution usually is allowed the advantage of questioning first during voir dire and closing last after the defense. However, in capital cases, individual voir dire under RCr 9.38 and the ordering of closing arguments under KRS 532.025(1)(a) are designed in recognition of the advantage the prosecution generally receives and grants that acknowledged advantage to the defendant. The court erred in not allowing the defense to question the jurors individually first.

10. Improper Denial Of Defense Challenges For Cause.

The Commonwealth cites no cases in support of its position. It is uncontroverted jurors who announce they cannot or will not consider mitigating evidence in determining a sentence should be struck for cause. Eddings v. Oklahoma, 455 U.S. 104 (1982). Jurors Jetter, Jameson, McCalvin (whom the appellee did not address at all), and Eldridge were clear—even with mitigating evidence they could not consider the minimum sentence. Jurors Massey and Bartley informed the court they were aware St. Clair had previously been sentenced to death. TE IV, 357-368; TE IX, 271. It was error for the court to refuse to strike these jurors for cause.

Again, the appellee did not bother to engage in an analysis of the fact jurors who stated they could not consider the full range of penalty should have been struck for cause, but just chose to minimize the prejudice of the responses. Jurors Hatcher, Jameson, Jetter, McCalvin, Stevens, and Harrison all clearly stated they could not consider the full range of penalty and were only “rehabilitated” through the legal fiction of the “magic question.” See Montgomery v. Com., 819 S.W.2d 713, 716-718 (Ky. 1991). Grooms v. Com., 756 S.W.2d 131, 137 (Ky. 1988), 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.” It was error for the trial court to refuse to excuse these jurors for cause.

11. Inconsistent Ruling And Improper Excusal For Cause.

During individual voir dire, many jurors who indicated they would tend to impose the harshest penalty were “rehabilitated” by the court and retained over defense objection. 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. Jameson expressed difficulty in considering the minimum and the defense moved to strike him for cause, which was denied. Id. at 91. Jetter indicated if the Commonwealth proved its case, and the defense put on no evidence, she could not consider the minimum. Id. at 102. The court denied the defense motion to strike her. Amshoff said she could not impose death and was excused over defense objection. TE 3 220. Donahue expressed reservations about imposing death and was excused from service on Commonwealth motion. TE 4 321, 326. Simon was excused because he expressed reservations about imposing the death penalty. TE 6 157. McCalvin expressed difficulty in imposing the minimum sentence and the defense motion to excuse her for cause was denied. Id. at 160. Bennett was excused upon expressing grave reservations about imposing death. Id. at 268. Polson said he would automatically vote for death and the defense would have the burden of convincing him to impose a lesser sentence, but the court overruled the defense’s motion to strike him. Id. at 303. Stevens made it clear 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 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. 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 automatic dismissal of jurors who expressed reservations about the death penalty, while rehabilitating jurors inclined to impose it, coupled with the court's pointed change in questioning violated St. Clair's rights and requires reversal.

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

Appellee states Appellant complains every time the prosecution "scores a point." (Appellee's brief at 50). However, a severe violation of the Rules of Evidence that results in the harm the Rule is expected to prevent is reversible error, no matter how dismissive Appellee chooses to be in its rhetoric. Appellee, apparently prepared to completely ignore the Rules of Evidence when they are inconvenient, characterizes the improper bolstering of co-defendant and convicted murderer Dennis Reese as normal questioning and answering. Appellee claims St. Clair cited no rule or case prohibiting such improper bolstering, but St. Clair cited KRE 608 and its prohibition against bolstering a witness' credibility before it is attacked. Nothing in the rule allows the prosecution, on direct examination in a re-sentencing, to bolster the credibility of a witness before it has been attacked. Appellee cites no prior attack on Reese's character that might allow for their bolstering and does not even bother to address its own argument below that the cross-examination of Reese during the first trial would allow for Reese to be bolstered before this new jury. Counsel's objection below was correct—Reese's credibility must have been attacked first *before this jury* before the Commonwealth was entitled to attempt to bolster his testimony.

13. Improper Direct of Det. Melton To Bolster Reese.

Appellee's failure to address the substance of this issue should be taken as a concession of error. See CR 76.12(8)(c). Contrary to appellee's assertion, Det. Melton did not just testify Reese's diagram was accurate. Appellee Brief, p. 51. The Commonwealth asked Det. Melton "...[I]n considering...the...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?” In response, Det. Melton responded, “He was accurate...” TE 17 51. Bolstering is the enhancement of unimpeached testimony with other evidence. *See Black's Law Dictionary* 186 (8th ed.2004). Generally, a witness may not vouch for the truthfulness of another witness. Stringer v. Com., 956 S.W.2d 883, 888 (Ky. 1997). This is because such testimony “remove[s] the jury from its historic function of assessing credibility.” Newkirk v. Com., 937 S.W.2d 690, 696 (Ky. 1996). This is particularly true when a witness is allowed to state his opinion as to the truthfulness of another witness, where that opinion leads, as it did in this case, to a conclusion that the defendant is guilty. The prosecutor’s rephrasing of the question to Det. Melton did nothing to clear up the perception Melton was vouching for Reese.

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

Appellee argues it complied with KRS 504.070(4) which 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.” Appellee argues, “The words “written” and “in writing” do not appear in the rule.” Appellee Brief, p. 53. The word “file” is defined as “to place in a file” or “to arrange (papers, records, etc.) in convenient order for storage or reference.” Dictionary.com Unabridged (v 1.1). Random House, Inc. 24 Sep. 2008. Appellee does not explain how one goes about filing a verbal “off the record” discussion. The prosecutor repeatedly urged the defense to file notice of a mental defense. TH 06/15/05 24, TH 07/18/05 7-8. For the prosecutor to state repeatedly it needed written notice to be filed of a mental defense, and yet argue that the prosecution is exempt from the same notice requirements is disingenuous and absurd. As the trial judge noted, “[T]his is a Death Penalty case so everything you do, do it in writing. Okay?”

15. Improper Direct Examination of Dr. Walker.

Leading questions. The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). The prosecutor's assertions to the contrary, the Commonwealth admitted it had been leading Dr. Walker:

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.

Repetitive, Bolstering Testimony. The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). The fact the jury heard Dr. Walker's cumulative and repetitive testimony about the traits of Antisocial Personality Disorder (violent, impulsive, manipulative, deceptive and disposed to domestic violence) served only to inflame the jury.

Lack of foundation for expert opinion. Dr. Walker gave her opinion on Dr. Caruso's qualifications based on what the prosecution had read to her over the phone. Her opinions were irrelevant and not elicited. The objection should have been sustained.

Lie Detector References. Dr. Walker initially testified persons with Antisocial Personality Disorder "don't get anxious like normal people. They can pass a lie detector test **because they don't sweat like normal people.**" The prosecution directly asked if one of the physiological differences between normal people and psychopaths was the **low galvanic skin response**. TE 22 159. The prosecution knew exactly what it was doing by asking this. Dr. Walker responded, "Oh, yeah. The galvanic skin response is the lie detector....". *Id.* The logical inference from this line of questioning was St. Clair had taken a polygraph examination. The court erred in allowing the testimony concerning lie detector tests, especially when St. Clair never submitted to any such test and the testimony was irrelevant.

Improper question. It is disingenuous for Appellee to state “Ms. Todd’s question did not mention Dr. Caruso. Neither did Dr. Walker’s answer.” Dr. Walker had just been asked about the fact Dr. Caruso had listed 8 total diagnoses for St. Clair while Dr. Walker had only listed 4. The improper question –“Is there anything about listing separate diagnoses that would be significant for someone involved in a private practice?”—can leave no doubt the prosecution was referring to defense expert Dr. Caruso.

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

Appellee’s failure to address the substance of this issue should be taken as a concession of error. CR 76.12(8)(c). Certainly, the Commonwealth is allowed to call witnesses. That is not the issue. The court order specifically stated 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.” TR 2 172. To this end, the parties had agreed upon the witness summaries of Unruh and Minton. Over objection, the prosecution called these witnesses to the stand rather than use the agreed-upon witness summaries. The real issue is whether the Commonwealth, once having agreed to use these witness summaries, can change its mind and call the witnesses to the stand. The trial court abused its discretion.

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

The appellee’s failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c).

The purpose behind this Court’s ruling on the KRE 404(b) issue in St. Clair, 140 S.W.3d 510, 536-37 (Ky. 2004) does not exist in this resentencing trial because the identity of the perpetrator is not at issue. The prosecution has argued this Court’s ruling on this issue in St. Clair, *supra*, is law of the case. Gossett v. Com., 441 S.W.2d 117, 118-119 (Ky. 1969) stated “The application of the rule must be viewed in the light of its purpose, and it has been held that where extension of its effect will result in the very evil which existence is intended

to prevent without correcting any error that has prejudiced a litigant's substantial rights, the extension will not be applied." See also White v. Com., 360 S.W.2d 198, 202 (1962) ("We appreciate that this is contrary to our holding on the first appeal of this case, but we consider that the law of the case rule has sufficient flexibility to permit us to admit and correct our error, particularly where substantial injustice might otherwise result.")

18. Improper Introduction Of Inflammatory Autopsy Photographs.

Even though this Court found the autopsy photographs of Brady relevant as to guilt in the first trial, they were not relevant in this re-sentencing and this jury was not charged with determining the cause or manner of Brady's death. This jury was only charged with finding whether or not the Commonwealth had proved an aggravator and the resultant penalty. The autopsy photographs did not establish any element of the aggravator. They simply served to inflame the jury and accomplished their goal. The Commonwealth is incorrect that the "law of the case" requires this Court to ignore this distinction.

19. Failure Of The Trial Judge To Recuse Himself.

Appellee's failure to offer anything in the way of a substantive response should be taken as a concession of error as to the merits. CR 76.12(8)(c). St. Clair has not contended Judge Waller should have been disqualified because he presided over the original trial. Appellee Brief, p. 56. St. Clair's argument is Judge Waller should have recused himself because he expressed an opinion as to the sentence he imposed in St. Clair's 1998 trial. He immediately sentenced St. Clair to death after the jury's verdict, rather than allow St. Clair an independent sentencing proceeding as envisioned by KRS 532.025. As this was a resentencing trial and the judge had already expressed an opinion as to the ultimate issue, he should have recused himself.

21. Inadequate Hearing on Pro Se Request for Substitution of Counsel.

The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). Appellee contends St. Clair merely made broad "generalizations" about his unhappiness with defense counsel. Appellee Brief, p. 57. St. Clair specifically informed the court he had to file his own motions because his attorneys refused to do so; counsel Mirkin had only been to see him twice in prison and written to him twice; he was not receiving copies of the pleadings; counsel Gibson was upset with him; his attorneys told him not to file any more complaints against the prosecutors and he believed his defense counsel had made a 'secret deal' with the Commonwealth. These concerns warranted a meaningful hearing as it was obvious there had been a complete breakdown in communications between St. Clair and counsel.

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

The Commonwealth barely bothers to respond, except to state Appellant did not cite to any Kentucky authority for the proposition that a defendant may allocute to the jury. In Quarles v. Com., 142 S.W.3d 73, 82 -83 (Ky., 2004) the Court held a defendant has a right to speak to the jury before the imposition of punishment:

Without determining whether the failure to allow Appellant to speak at the sentencing hearing would by itself be reversible error, we merely caution the court on retrial to allow Appellant to speak at the sentencing hearing (if any) if she so requests in a timely manner. *See Green v. U.S.*, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961) (holding that failure to afford a defendant the opportunity to speak to the sentencing court was a violation of Federal Rule of Criminal Procedure 32(a), and constituted a denial of due process, yet stating that such an error could be harmless). However, the right to speak at the sentencing hearing, just like the right to testify at trial, is not without limit. The court may in its discretion, limit the testimony in duration and content.

Thus, a court may not wholly refuse to allow a defendant to speak to the jury, but may dictate at what point the defendant will be allowed to speak and can limit the length and content of that speech. The court wholly refused to allow St. Clair to address the jury.

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

The crimes the Appellant was convicted of committing occurred in 1991. He was tried, convicted and sentenced to death in 1998. St. Clair v. Com., 140 S.W.3d 510 (Ky. 2004); TR I, 21-30. That conviction was affirmed by this Court August 2004, but his sentence was vacated. In April 2005, the re-sentencing hearing was held. Thus, between finality of the Opinion vacating the death sentence and the start of the re-sentencing only eight months elapsed—hardly a lengthy time.

Both the *pro se* motion for a continuance because of the defense investigator's illness and counsel's request for a continuance to locate an eyewitness identification expert were well-taken and not overreaching. It was error to deny the continuances. Appellee points out Jennifer Word was a defense investigator in the first trial, intimating she was the investigator preparing for the re-sentencing. This is simply not true. By the time of the re-sentencing, Word was no longer an employee of the DPA and another investigator was working on the case. Thus, the ill investigator was new to the case and her illness and inability to prepare were not minimized by any work done by Word. Counsel's motion for a continuance to locate an eyewitness expert was reasonable. The court had just ruled testimony from the first trial concerning an eyewitness account would be read for the jury and the defense needed an opportunity, given this unanticipated ruling, to prepare an answer to the testimony. Such request was reasonable. The trial court's denial was not.

24. Improper Admission Of Victim Impact Testimony.

While Ms. Druin's testimony about her father was moving and heartbreaking, such evidence must be allowed by statute before it can be introduced. There is no Kentucky statute which allows for victim impact evidence in capital cases. Appellee cites KRS 532.055(2)(a)(7), but that statute is not specific to capital cases. KRS 532.025, which delineates what evidence may be admitted in a capital sentencing does not provide for victim impact testimony. There may be good reason for the legislature's choice not to allow

such evidence in capital cases. The legislature may have wished to prevent jurors acting out of vengeance, rather than justice. For whatever reason, the statutory scheme clearly does not allow for such evidence in a capital sentencing proceeding.

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

Appellee misunderstands this argument. The defense was not seeking to impeach the Oklahoma convictions. Instead, the defense intended to establish through Judge Payne's testimony that the murders in Oklahoma did not involve strangers to St. Clair, as did the present case. The prosecution had colored St. Clair has a serial killer who kills one stranger after another. The Commonwealth relied upon the Oklahoma convictions as aggravators, bringing them into issue - opening the door for the defense to rebut its characterization of the circumstances surrounding the Oklahoma murders.

No matter how much Appellee insists that the testimony was hearsay, it simply wasn't. Judge Payne simply was prepared to testify as to his perceptions of the feud between the St. Clairs and the victims of the Oklahoma murders. His perceptions are not hearsay. Young v. Com., 50 S.W.3d 148, 170 (Ky. 2001). The witness was a judge. The court's request of defense counsel that he "explain what 'your own knowledge' means to the witness" is absurd. TE Vol. XV, 132-133 Clearly, an Oklahoma judge understands the concept of hearsay and the suggestion he not understand what 'from your own knowledge' means is preposterous and displays the court was far from inclined to allow the defense any shot at presenting a cogent case.

The Supreme Court has repeatedly asserted the right to present a defense at trial is a fundamental right guaranteed by the 6th and 14th Amendments. U.S. v. Scheffer, 523 U.S. 303, 308, (1998); Michigan v. Lucas, 500 U.S. 145, 149 (1991); Taylor v. Illinois, 484 U.S. 400, 408, (1988); Rock v. Arkansas, 483 U.S. 44 (1987); Crane v. Kentucky, 476 U.S. 683, 690-91 (1986). "The right to offer the testimony of witnesses...is in plain terms the right to

present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The exclusion of defense evidence undermines the central truth-seeking aim of the criminal justice system because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person. See U.S. v. Nixon, 418 U.S. 683, 709 (1974).

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

St. Clair received the harshest of all sentences. For his resentencing to be based largely on witness summaries—"memory and opinion as to what was the evidence at a former trial," was error. Boone v. Com., 821 S.W.2d 813 (Ky. 1992) (Leibson, dissenting). The summaries were rank hearsay. His due process rights and his right "to meet the witnesses face-to-face" were violated.

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

Appellee's failure to address the substance of this issue should be taken as a concession of error. CR 76.12(8)(c). Appellee's sole response is the law of the case doctrine bars review. Appellant refers this Court to his reply to Argument 4, supra.

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

The appellee, in a response more typical of a closing argument harangue intertwining actual and imagined "facts," suggests St. Clair is asking this Court to sit as an appellate jury. Nothing could be further from the truth. Kentucky no longer has a mandatory death sentence. A verdict of guilt alone does not ensure a subsequent death sentence is supported by evidence (see Arg. 5), constitutionally imposed (see Arg. 32) or warranted and proportionate (see Arg. 29). KRS 532.075 mandates precisely the review this argument addresses. It may be, as the appellee laments, merely a state statute but it establishes the

nature of this Court's review of death sentences. And once such a review is established by state statute, it must be applied constitutionally to comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). This Court must determine whether St. Clair's "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 appellee's misstatement of the evidence, misdirection and hyperbolic hysteria about California's Zodiac killer is an utter disservice to the critical review this Court is obligated to conduct. 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. See Brief for Appellant at 110 -112.

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

The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits. See CR 76.12(8)(c). The appellee's primary response is this issue is unpreserved and, thus, unreviewable. Appellant refers this Court to his combined reply to Arguments 32 – 35, infra. The appellee, who must not have read past the first sentence of this issue, claims complete bafflement about the argument this issue is jurisdictional. This argument is fully developed with citation to authority in the Brief for Appellant at 115 – 116. The appellee also argues the law of the case doctrine bars review. Appellant refers this Court to his reply to Argument 4, supra.

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

The appellee's failure to address the substance of this issue should be taken as a concession of error as to the merits of the issue. See CR 76.12(8)(c).

Baze v. Rees, 128 S.Ct. 1520 (2008), requires this Court to address and adopt a legal standard for the type of challenge raised here. The plurality opinion in Baze laid out a legal standard, but that opinion was joined only by three Justices. Three other Justices believed

the legal standard articulated by the dissent should apply. When there is no majority opinion, the concurring opinion resting on the narrowest ground controls. See Marks v. U.S., 430 U.S. 188, 193 (1977). Here, there may be no concurring opinion on narrower grounds with regard to the legal standard. Justice Alito's concurring opinion (he was also part of the plurality) adopted the plurality's legal standard in its entirety. Justice Stevens never said which legal standard he believes applies, expressly noting his viewpoint applied under the plurality opinion and under the dissenting opinion. Justice Thomas and Justice Scalia's opinion stated a method of execution can be cruel and unusual punishment only if it intentionally inflicts pain - - a viewpoint not only rejected by the other seven Justices, but also incompatible with the plurality opinion because it would, in essence, reverse the plurality by saying that an inmate could not prevail under circumstances in which the plurality said the inmate could. This leaves the Baze Court with a 3-3 split concerning the legal standard that applies to the challenge before this Court.

While Baze upheld the constitutionality of Kentucky's lethal injection protocol, the Court made clear it was doing so on the record before it, thereby leaving open the door for a death-sentenced inmate who can make a stronger showing that Kentucky's lethal injection protocol is unconstitutional to prevail under the legal standard laid out in Baze. The Baze Court made clear its opinion was only dealing with the constitutionality of the protocol as written, not as implemented, and that particular safeguards within the protocol ensure that the risk of pain is not sufficient to establish an 8th Amendment violation. The value of those safeguards goes only so far as they are actually implemented when carrying out an execution by individuals who are adequately credentialed in doing so and fully understand the roles they are charged with carrying out. The Baze Court repeatedly referenced "maladministration" of an execution protocol as something that could give rise to a constitutional violation under the legal standard it was establishing. Baze, supra at 1537.

As Baze ruled, “failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” Baze, supra at 1533. Whether because of information not presented in Baze or because of how the protocol is actually applied, that constitutionally unacceptable risk will exist if St. Clair is executed and must be resolved. If this Court does not declare lethal injection unconstitutional, it should at least adopt a standard to determine when it is. The case should be remanded for proceedings consistent with that standard.

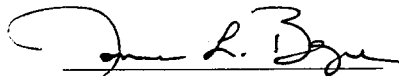
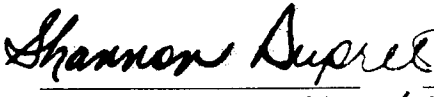
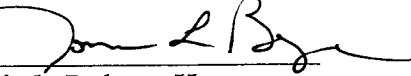
- 32. The Death Penalty Is Unconstitutional,**
- 33. Denial Of Access To Data And Method Of Proportionality Review,**
- 34. Death Qualification Of Jurors Is Unconstitutional &**
- 35. Residual Doubt Bars Death Sentence.**

The appellee’s failure to address the substance of these issues should be taken as a concession of error as to the merits of each issue. See CR 76.12(8)(c). The appellee’s one sentence response to each of these issues is they are unpreserved and, thus, unreviewable. This argument ignores well-established law to the contrary. Unpreserved errors are reviewable where the death penalty has been imposed. KRS 532.075(2); Rogers v. Com., 992 S.W.2d 183, 187 (Ky. 1999); Perdue v. Com., 916 S.W.2d 148, 153-154 (Ky. 1995).

Conclusion

The judgment of the Bullitt Circuit Court should be reversed.

Respectfully submitted,

 Donna L. Boyce Assistant Public Advocate	 Shannon Dupree Smith Assistant Public Advocate	 Linda Roberts Horsman Assistant Public Advocate
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