SUPREME COURT OF KENTUCKY
NO. 2005-SC-828

MICHAEL DALE ST. CLAIR — **APPELLANT**

versus

Appeal From Bullitt Circuit Court
Indictment No. 92-CR-10-2
Honorable Thomas L. Waller, Judge

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLEE
COMMONWEALTH OF KENTUCKY

Jack Conway
Attorney General of Kentucky

David A. Smith
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that the record was returned and copies hereof were mailed July 30, 2008 to the Honorable Thomas L Waller, Bullitt Circuit Judge, P.O. Box 97, Shepherdsville, Ky. 40165 and Hon. Donna L Boyce, Hon. Shannon Dupree, and Hon. Linda Roberts Horsman, Assistant Public Advocates, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

David A. Smith

David A. Smith
Assistant Attorney General

INTRODUCTION

Michael St. Clair was sentenced to death for the 1991 murder of Frank Brady. After the trial, this Court gave retroactive effect to a 1998 legislative amendment adding life without parole as a sentencing option. On remand, a new penalty phase jury re-sentenced him to death despite the life without parole option.

STATEMENT CONCERNING ORAL ARGUMENT

This is a direct appeal. The Court customarily hears oral arguments in death penalty cases that are on direct appeal.

TABLE OF POINTS AND AUTHORITIES

ONE - PAGE SUMMARY OF THE CASE

This appeal is from a re-trial. St. Clair has Oklahoma convictions for four murders and a conspiracy to murder (life without parole for each murder).

St. Clair escaped from an Oklahoma jail in 1991. He carjacked a young paramedic in Colorado, handcuffed him, and executed him in New Mexico.

St. Clair carjacked Frank Brady in Hardin County, handcuffed him, and executed him in Bullitt County. St. Clair later shot at a Kentucky State Trooper during a traffic stop in Hardin County. A high speed chase ensued. The Trooper's cruiser eventually was disabled by one of the shots St. Clair had fired. St. Clair escaped, then returned to Oklahoma where he was captured.

St. Clair was sentenced to death for the 1991 murder. Some two years after St. Clair's trial, this Court gave retroactive effect to a 1998 statute adding life without parole as a sentencing option. Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000). Some two years later still, this Court reversed St. Clair's death sentence on the basis of its Phon decision. St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004). There were seven separate opinions. [1]

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[1] There were four separate opinions in the plurality decision reversing his 2000 Hardin County conviction and death sentence for kidnapping, attempted murder, arson, and receiving stolen property. St. Clair v. Commonwealth, 174 S.W.3d 474 (Ky. 2005). The Court found that two details during his wife's testimony (he burned a truck somewhere and was in Louisiana) violated the marital privilege because she participated only in the continuing escape that motivated and facilitated the other crimes committed during the course of the escape. The Court held this not harmless compared against other evidence placing him in Kentucky (e.g., two eyewitness identifications, fingerprint, Louisville hat label).

COUNTERSTATEMENT OF THE CASE

The statement of the case appearing in St. Clair's brief is little more than a three and one-third-page summary of his arguments. *E.g.*, "challenges for cause were improperly denied", "abundant irrelevant evidence", "inflammatory testimony", "improper questions", "blatantly led witnesses", "improper argument", "bolstered its witnesses", "irrelevant, prejudicial evidence", "improperly instructed the jury."

Therefore the Commonwealth does not accept St. Clair's statement of the case. CR 76.12(4)(c)(iv).

Frank Brady had three daughters and four grandchildren. (TE Vol. XIII, pp. 90, 93). Six weeks after Mr. Brady's murder, his fifth grandchild was born. (*Id.*, pp. 93-94).

Frank Brady's corpse was found on October 8, 1991, approximately 150 yards from Old Boston Road in Bullitt County. (TE Vol. XIII, pp. 103-104, 108-109). Mr. Brady's corpse was handcuffed at the time it was discovered. (*Id.*, p. 109).

Michael St. Clair and Dennis Reese escaped from an Oklahoma jail during the very late hours of September 19, 1991 and the very early morning hours of September 20, 1991. (TE Vol. XIII, pp. 116-117). Part of a television antennae

in St. Clair's cell had been fashioned into a weapon which was used to effect the escape. (*Id.*, pp. 117-118).

St. Clair and Reese next burglarized an Oklahoma home occupied by Vernon Stevens and his mother, Neva. (TE Vol. XIV, p. 165). There, St. Clair stole a loaded Ruger Super Blackhawk .357 magnum revolver and a holster belonging to Mr. Stevens. (*Id.*, pp. 165, 167, 169-171). St. Clair and Reese left in a green pickup truck they stole from Mr. Stevens. (*Id.*, p. 169).

St. Clair and Reese proceeded in the stolen pickup truck to Dallas, Texas. (*Id.*, p. 173).

A telephone call by St. Clair caused his wife, Bylynn, and her brother, Shannon Gilbeaux, to travel from Durant, Oklahoma to Plano, Texas and meet him there. (*Id.*, pp. 174-175, 186). Bylynn and Shannon brought soap, shampoo, disposable razors, binoculars, a camouflage jacket, at least $ 1,300 cash, clothes, two suits, and a pair of handcuffs. (*Id.*, p. 175).

St. Clair and Reese next traveled to Denver, Colorado on a Greyhound bus. (*Id.*, pp. 188-190).

In Denver, the pair kidnapped a young man named Timothy Keeling as he was leaving a supermarket. (*Id.*, pp. 190-192). St. Clair told Mr. Keeling that he and Reese were interested in buying his white customized pickup

truck and wanted to take it for a test drive. (*Id.*, pp. 191-192).

Reese drove, St. Clair sat on the passenger side, and Mr. Keeling sat between them. (*Id.*, p. 192). As they were leaving the parking lot, St. Clair pointed the .357 magnum revolver at Mr. Keeling and handcuffed him. (*Id.*, pp. 192-194).

"We drove all night." (*Id.*, p. 192). Mr. Keeling was talking to his captors. (*Id.*, pp. 193, 195-196). "He was scared." (*Id.*, p. 193). "He prayed for us." (*Id.*, p.. 196). Mr. Keeling showed St. Clair a wallet photo of his infant daughter. (*Id.*, pp. 195-196). This ordeal lasted "about ten or twelve hours." (*Id.*, p. 192).

They drove through New Mexico. (*Id.*). Approximately seven miles before they crossed the New Mexico border into Texas, St. Clair used the pretext of needing to stop and urinate along the roadside to coax Tim Keeling into getting out of the truck. (*Id.*, pp. 192-193). St. Clair shot Tim Keeling twice, murdering him. (*Id.*, p. 194).

When St. Clair returned to the truck, he said that killing people was like killing dogs, that after you kill the first one the next one is easy. (*Id.*, p. 195). St. Clair was happy and smiling when he said this. (*Id.*).

As they were driving on afterwards, St. Clair went through Tim Keeling's wallet. (*Id.*). St. Clair removed the photograph of Mr. Keeling's 18-month-old daughter. (*Id.*). St. Clair tore up the photograph and threw it out the window. (*Id.*). St. Clair said the reason he murdered Mr. Keeling before crossing the border into Texas was because Texas enforces its death penalty law. (*Id.*, pp. 195-196).

St. Clair and Reese next drove to Denton, Texas, near the Dallas area. (*Id.*, p. 196).

They then drove to Lafayette, Louisiana. (*Id.*, p. 197). St. Clair bought some more ammunition for the revolver, a box of .357 magnum wadcutters ("flat on the end") in Shreveport, Louisiana. (*Id.*, pp. 197-198). They next went to New Orleans, Louisiana. (*Id.*, pp. 198-199). There they visited a nightclub called "Mud Bugs." (*Id.*, p. 202).

St. Clair and Reese next headed north from Louisiana, traveling through Arkansas and Tennessee and into Kentucky. (*Id.*, p. 203). In Louisville, St. Clair bought a bottle of Early Times whiskey and drank some of it. (*Id.*, pp. 203-205).

They eventually discovered Old Boston Road. (*Id.*, pp. 205-206). St. Clair wanted to switch Mr. Keeling's truck for a red or maroon Ford Ranger

pickup truck he spotted at a rest stop. (*Id.*, pp. 230-232). St. Clair carjacked the owner of the Ranger truck, Frank Brady, and handcuffed him. (*Id.*, p. 232). Reese got in and drove while Mr. Brady sat in the middle and St. Clair sat on the passenger side with the .357 magnum revolver in his lap. (*Id.*, p. 233).

Mr. Brady talked non-stop. (*Id.*, pp. 234-235). "He was scared." (*Id.*). "He was worried and scared." (*Id.*, p. 235).

When they arrived at a secluded area on Old Boston Road some 90 minutes later that night, St. Clair marched Frank Brady into the woods and murdered him with two gunshots. (*Id.*, pp. 233-236). When St. Clair returned to Mr. Brady's truck, he "was happy, cheerful, joking." (*Id.*, p. 236). St. Clair had lost the handcuff key so he had to leave Mr. Brady handcuffed when he shot him. (*Id.*).

For his part in Frank Brady's murder, Dennis Reese pleaded guilty and received a sentence of life without parole for at least 25 years. (TE Vol. XIII, pp. 119-120, 122-123).

Additional factual details and the procedural history of this case are summarized in the direct appeal decision of this Court from the first trial. St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004).

Both parties introduced testimony from mental health experts during the re-trial of this case. The substance of their testimony does not appear to be in issue in this appeal. Instead, the questioning of these witnesses at the re-trial is at issue. Therefore the matter of expert witnesses will be addressed in the argument portion of this brief.

ARGUMENT

1.

St. Clair never requested "hybrid representation." St. Clair personally informed the trial court that he did not wish to proceed *pro se* to any extent.

This claim is unpreserved for appellate review. St. Clair's brief grudgingly concedes non-preservation. His argument begins, "This issues does not have to be preserved for review . . . ." That, of course, is the whole ball game. An inquiry into a defendant's desire for "hybrid representation" cannot be triggered unless he requests "hybrid representation."

St. Clair's argument concludes by asserting that his claim alleges "structural error", *i.e.*, entitlement to automatic reversal without a showing of

prejudice: "The failure to conduct an appropriate hearing on this issue is a structural defect in the trial mechanism." The word "appropriate" in the sentence just quoted is a red flag. The sentence tried to create the impression there was no hearing at all but includes a qualifier for deniability. There were several hearings.

A.

The first category of *pro se* pleadings

St. Clair's *pro se* filings fall into two categories. Filings in the first category are listed below. Soon after filing them, St. Clair appeared in court with counsel and informed Judge Waller that he did not wish to act as his own counsel. This extinguished any occasion for conducting a "hybrid representation" inquiry.

1. Motion to exclude life without parole as a sentencing option (TR Vol. I, pp. 116-120). This Court had awarded St. Clair a new penalty phase for want of a life-without-parole sentencing option requested at his first trial. St. Clair's *pro se* motion to exclude life without parole as an option in the re-trial may have been designed to mock the Commonwealth.

On August 16, 2005, at one of the hearings regarding St. Clair's filings of *pro se* motions, he, together with defense counsel, withdrew this request. (TE Vol. I, pp. 37-38; TR Vol. I, p. 131).

2. Motion for speedy trial within 180 days (TR Vol. I, pp. 121-123). This was an attempt to salvage a prior speedy trial claim right after having requested and received yet another continuance.

St. Clair's *pro se* motion demanding a speedy trial included a handwritten check-the-box notation that stated: "I am Lead Counsel [X] or I am Co-Counsel [ ]." [2]

At a January 10, 2005 hearing on St. Clair's *pro se* motions, Judge Waller observed that "Mr. St. Clair wants to be designated as lead counsel. So I will take . . ." (TH Vol. 01/10/05, p. 2). St. Clair interrupted: "I have changed my mind and Withdraw that Motion." (*Id.*). Owing to St. Clair's interruption, it can never be know whether Judge Waller was about to conduct the inquiry envisioned in St. Clair's brief before this Court. There was no reason to proceed with a "hybrid representation" inquiry.

3. JCC complaint and KRS 26A.020 affidavit accusing trial judge of being a drunk (TR Vol. I, pp. 140-151). St. Clair's *pro se* complaint

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[2] St. Clair's brief accurately describes the disjunctive check-the-box designation but argues as though he had checked the co-counsel box instead. According to page 5 of St. Clair's brief, "St. Clair continued to act as co-counsel throughout his resentencing trial." That assertion is wrong on two scores. First, St. Clair had designated himself as "lead" counsel to the exclusion of "co-counsel" status. This distinction was not lost on Judge Waller. (TH Vol. I, p. 2; TR Vol. I, p. 131). Second, the last of St. Clair's *pro se* motions were filed on the eve of the re-trial. This was hardly acting as co-counsel "throughout his resentencing trial."

about the trial judge to the Judicial Conduct Commission was filed in the record by DPA defense counsel. (*Id.*).

Dated September 21, 2004, the theme of the JCC complaint was that the Honorable Thomas L. Waller, Bullitt Circuit Judge, had a "drinking problem (LIQUOR INTAKE)." (*Id.*, p. 144). The JCC complaint was dismissed on November 20, 2004. (*Id.*, p. 146).

One of St. Clair's DPA attorneys later included the JCC complaint as an exhibit to a formal KRS 26A.020 affidavit addressed to this Court. (TR Vol. I, pp. 140-144). [3]

B.

The second category of *pro se* pleadings

St. Clair's *pro se* pleadings falling into the second category are listed below. A detailed discussion of them is not necessary, as they were filed after entry of a January 12, 2005 order which stated in part:

> This case came before the Court on January 10, 2005 for a hearing . . . .
>
> It was agreed by counsel for the Commonwealth

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[3] Always the gentleman, the response of this learned Circuit Judge was: "Mr. St. Clair, I don't drink but I appreciate the compliment." (TH Vol. 01/10/05, p. 4). (The volume of this hearing is incorrectly captioned as a September 30, 2005 "Transcript Of Sentencing." The date "September 30" has been lined out and replaced with a handwritten notation of "1/10.")

> 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 Vol. I, p. 131).

The following is a list of St. Clair's subsequent *pro se* pleadings.

All of them were filed during the month leading up to St. Clair's re-trial.

1. motion to dismiss because an alleged tape recording of a statement St. Clair allegedly gave police was not turned over in discovery, and because of the adjustment band on a green baseball cap (TR Vol. II, pp. 174-176).

2. letter to Judge Waller (*Id.*, pp. 177-181).

3. motion to appoint one or two additional lawyers for a total of three or four (*Id.*, pp. 218-224).

4. motion for the defense to sit at the table where the prosecution sits (*Id.*, pp. 225-227).

5. motion to arrest prosecutors for feloniously adjusting the head band on a green baseball cap as a demonstration to the jury during the first trial (*Id.*, pp. 228-231).

6. same motion as # 1 above (*Id.*, pp. 232-236).

7. motion to be tried in a courthouse that is not a storage building (*Id.*, pp. 237-242).

8. same motion as # # 1 and 6 above (*Id.*, pp. 245-265).

9. notice of complaints to the Bullitt County Attorney and the United States Attorney General for the arrest of St. Clair's prosecutors regarding the green baseball cap (TR Vol. III, pp. 349-358).

10. and 11. motion to fire his attorneys, and simultaneous motion for a six-month continuance of the re-trial scheduled to begin in six days (*Id.*, pp. 370-378).

12. second motion to exclude life without parole as a sentencing option (*Id.*, pp. 379-380).

13. motion for Judge Waller to recuse, filed on the day before the re-trial began (*Id.*, pp. 408-411).

14. motion to disqualify Michael Wright as a prosecutor because of the green baseball cap, filed on the day before the re-trial began (*Id.*, pp. 412-414).

C.

The second hearing on St. Clair's *pro se* motions

In section **2.** of part **A.** of this argument, the Commonwealth described the January 10, 2005 hearing at which St. Clair withdrew his request to act as his own attorney before Judge Waller could even ask about it.

In part **B.** of this argument, the Commonwealth quoted from the January 12, 2005 order. The order recited that upon the agreement of all the lawyers and St. Clair personally, any *pro se* motions filed after that date would be channeled through defense counsel before being considered by the court.

There was never any request to reconsider or alter that January 12, 2005 order. St. Clair never stated that he wished to change his mind yet again and proceed as his own counsel.

St. Clair's brief makes much of an August 10, 2005 hearing (six days before the re-trial) at which the Commonwealth sensed the potential of a Trojan Horse in the works. [4] According to page 7 of St. Clair's brief, the following was said in reference to St. Clair's motion to fire his attorneys, which is item # **10.** in part **B.** of this argument:

> 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.

(emphasis added).

As shown above, St. Clair was specifically asked on the record, in the presence of defense counsel, whether he desired "hybrid" representation. St.

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[4] The undersigned recalls the matter but cannot find this hearing in the record.

Clair answered that he did not want it. St. Clair reaffirmed what he had said some seven months earlier at the January 10, 2005 hearing, that he wanted to be represented by counsel, and by counsel only.

C.

The third hearing on St. Clair's *pro se* motions

On the Monday morning that jury selection began, there was a hearing about some *pro se* motions St. Clair had filed on the preceding Friday. (TE Vol. I, p. 33). The first *pro se* motion taken up was to disqualify Assistant Attorney General Michael Wright so that he could testify about his adjustment of the head band on a green baseball cap during the first trial. (*Id.*). (Also see item # **14.** in part **B.** of this argument.) The second was for Judge Waller to recuse because of the way he had presided over the first trial. (*Id.*). (Also see item # **13.** in part **B.** of this argument.) The third was a renewed motion to exclude the sentencing option of life without parole. (*Id.*, p. 37). (Also see item # **12.** in part **B.** of this argument.)

In St. Clair's *pro se* oral argument about the green baseball cap, he twice stated falsely that Mr. Wright had "ripped it apart" when in fact Judge Waller and counsel all knew that the head band had been temporarily adjusted as a responsive demonstration before the jury. (*Id.*, pp. 33-34). The falsity of St.

Clair's *pro se* motion explains why defense counsel wanted no part in it: "It's his motion, Judge." (*Id.*, p. 33). St. Clair's assertion that he had served the Commonwealth likewise was false. (*Id.*, pp. 33, 35).

The *pro se* motion for Judge Waller to recuse was denied without comment by St. Clair, defense counsel, or the Commonwealth. (*Id.*, pp. 36-37). Judge Waller explained his ruling. (*Id.*).

St. Clair withdrew his *pro se* motion to exclude life without parole as a sentencing option. (*Id.*, pp. 37-38).

D.

Conclusion

There is no basis in fact for St. Clair's argument. His claim to "structural error" for want of a "hybrid representation" hearing should be rejected accordingly.

2.

St. Clair's testimony from his first trial was properly received in evidence at his re-trial.

St. Clair testified during the guilt phase of his original trial in 1998. Pursuant to the decisions of this Court in Sherley v. Commonwealth, 889 S.W.2d 794 (Ky. 1994) and Bess v. Commonwealth, 26 Ky. L. Rptr. 839 (Ky.

1904), the Commonwealth introduced St. Clair's 1998 testimony during the penalty phase re-trial of this case in 2005.

The evidence of St. Clair's prior testimony was not introduced as a "witness summary." [5] Rather, counsel read the transcript of St. Clair's prior testimony to the jury. (TE Vol. XIX, p. 48 – TE Vol. XX, p. 210). Omitted were bench conferences, rulings, and questions and answers to which objections were sustained.[6] The transcript itself was not published to the jury.

It was observed at the re-trial that the right of the Commonwealth to introduce St. Clair's prior testimony was absolute and unconditional. The decisions of this Court in Sherley, *supra*, and Bess, *supra*, placed no

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[5] "Witness summaries" are discussed in part **A.** of this argument and in argument **27**. At the urging of St. Clair's attorneys, the prior testimony of several defense and prosecution witnesses was reduced to "witness summaries." The witness summaries were prepared and introduced by mutual agreement of the parties, under authority of this Court's recommendation in Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992), and with the approval of St. Clair personally and by counsel. The witness summaries themselves were not published to the jury. Instead, counsel read them aloud to the jury. The introduction of St. Clair's own prior testimony did not involve a witness summary.

[6] **Mr. Smith:** I would hasten to point out that it's not a summary of St. Clair's testimony that we are talking about. We are talking about the transcript of his testimony being read to the jury in full, minus any and all objections, bench conferences, things like that. (TE Vol. XIX, p. 4).

preconditions on the introduction of a criminal defendant's prior testimony. [7]

Though not required by law to do so, the Commonwealth offered the additional ground of rebuttal, in two different respects. (TE XIX, pp. 7-10).

First, St. Clair's prior testimony was coherent in its entirety. His attempt to explain away evidence of his guilt was cogent from beginning to end. This refuted the defense claim at the re-trial that St. Clair was a mental dullard. [8] Thus, the transcript of St. Clair's prior testimony bore directly on the sentencing issue of mental capacity, an issue which defense counsel themselves injected into

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[7] **Mr. Smith:** The Court's very well aware of how the unitary jury system is supposed to work. That anything and everything that is heard during the guilt phase is supposed to be considered by the sentencing jury. (TE Vol. XIX, p. 6).

It's the fact that he exercised his right to testify. He thereby waived any Fifth Amendment Privilege that he had. The U.S. Supreme Court and the Kentucky Supreme Court made clear that once you do that, you're subject to Cross Examination and all of the other consequences that naturally follow.

He was represented by counsel. He was under oath. There was no Ohio v. Roberts implication here. He testified with both eyes open and, as any other witness, and had he known that the day might come where his testimony might be used later on. (*Id.*, pp. 6-7).

My bottom line is, on introducing his testimony from the first trial, Sherley and Bess cases make it very clear that we don't have to show relevancy. We don't have to use it for impeachment purposes. We can put it in, period. (*Id.*, p. 7).

[8] During the first penalty phase trial of this case in 1998, St. Clair had prohibited his attorneys from presenting mitigating evidence regarding his mental abilities. St. Clair v. Commonwealth, 140 S.W.3d 510, 560-561 (Ky. 2004).

the penalty phase re-trial. [9]

Second, through cross-examination of the prosecution witnesses during the re-trial, defense counsel resumed a theme from the first trial. This theme was the suggestion of lingering doubt about the extent of St. Clair's participation, and investigative incompetency. [10] This defense theory had been refuted by the cross-examination of St. Clair himself during his prior testimony. (TE Vol. XX, pp. 150-206). It is yet another reason why St. Clair's prior

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[9] **Mr. Smith:** It so happens that it has an impeaching effect.

It occurs to me that all of this business about his mental health condition, the Court will recall the Cross Examination of Dr. Caruso, how Ms. Todd had to kind of step around things when she was talking about his Pro Se Motions. The Court had expressed some concern, concern I think everybody shares, about putting in his Pro Se Pleadings because of – just because of the contents of them. But obviously we would want to do that, or we had wanted to do that, you know, to show that he was mentally capable of doing this. So Ms. Todd sort of tap danced around that and just referred in general terms to St. Clair's arguing in court.

Well this transcript, Your Honor, shows that he was coherent. That he knew what was going on. That he could express himself without reservations. There are places in here where he goes on for several pages in this account of his as to what he did and did not do. (TE Vol. XIX, pp. 7-8).

[10] St. Clair's "residual doubt" claim appears as argument **35.** in his brief.

Mr. Mirkin: And as far as the question of residual doubt. What we have been setting up to argue on this case is the question of whether Reese is being fully truthful; whether Reese is describing what really happened; whether Reese is truthful when they puts these statements in St. Clair's mouth and, possibly, who pulled the trigger. (TE Vol. XIX, p. 21).

Defense counsel described the alleged incompetency on the part of the investigating officers as "errors or mishaps, or irregularities, or criticisms in the way the fingerprints were collected." (*Id.*, p. 17).

testimony was relevant to a question of fact before the jury, a question which, as in the case of mental capacity, was injected into the re-trial by defense counsel. [11]

St. Clair's complaint may offer a superficial appeal at an emotional level but it has no basis in law or fact.

The remainder of the Commonwealth's response is outlined as follows:

A. Notice

1. ***The law does not require a witness list.***

2. ***An official transcript of prior testimony is not a "witness summary."***

3. ***No court order required a witness summary of St. Clair's prior testimony or any commitment regarding St. Clair's prior testimony.***

4. ***Defense counsel had contemplated introducing St. Clair's prior testimony themselves.***

5. ***Defense counsel were not "surprised." Defense counsel did not show that but for the alleged surprise, their presentation of mitigating evidence would have been different. Defense***

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[11] **Mr. Smith:** They have been arguing the residual doubt all through this thing; through their examination of witnesses, through their General Voir Dire, make no mistake about that.

If they're complaining about certain witnesses not having been called? Well, I would remind the Court that some of these witnesses they list [in the defense motion to exclude the transcript of St. Clair's prior testimony], their summaries have been read into evidence; [KSP Lt.] Ronnie Crain, [KSP Det.] John Carr, people like that, to the extent that they want to call any of those people live now, they can have at it. (TE Vol. XIX, pp. 9-10).

counsel declined an offer to augment witness summaries with live testimony.

a. No Surprise

b. No Difference In Defense Presentation

c. Invitation To Let Defense Augment Its Case

B. Redaction

A.

Notice

St. Clair argues that he was not put upon notice that his prior testimony might be introduced. Obviously, St. Clair does not and cannot complain that he was unaware of the existence of this evidence or was unfamiliar with its content. It was his own testimony, after all. It was transcribed and used in the appeal from his first trial. His re-trial attorneys had a copy of the transcript and they had reviewed it beforehand.

1.

The law does not require a witness list.

St. Clair does not suggest that he was legally entitled to a witness list in advance of the re-trial. The law does not require the prosecution to submit a list of its proposed witnesses. King v. Venters, 596 S.W.2d 721 (Ky. 1980).

2.

An official transcript of prior testimony is not a "witness summary."

What St. Clair points to instead of the law is a mutual agreement that the parties would exchange "witness summaries" in advance of the re-trial. That being the sole basis for St. Clair's complaint, the simple answer is that his prior testimony was never introduced as a witness summary. Rather, his prior testimony was read to the jury from the official transcript. That is a different animal than a mutually agreed-to summary of a witness' testimony.

3.

No court order required a witness summary of St. Clair's prior testimony or any commitment regarding St. Clair's prior testimony.

St. Clair's brief hints that the exchanging of witness summaries was pursuant to court order. Actually, all Judge Waller did was order that whatever the parties agreed to do in the way of witness summary preparation be completed 10 days in advance of the re-trial. Judge Waller did not order the preparation of witness summaries. The deadline he imposed wound up being relaxed for the benefit of both parties. (TE XIX, pp. 15, 38-39). It is unreasonable for St. Clair to try to impute a court ordered requirement that something other than

a witness summary be submitted in advance.

4.

Defense counsel had contemplated introducing St. Clair's prior testimony themselves.

St. Clair accuses the prosecution of somehow tricking his defense lawyers. The record refutes St. Clair's accusation.

The following excerpts are from the transcript of an August 30, 2005 hearing during the re-trial.

Mr. Smith: [T]here was mention made, probably by me, that we well in advance of the trial, weeks before the trial was scheduled to begin, Defense Counsel on the phone, it was me on one end, it was Mr. Mirkin, Mr. Gibson on the other. While we were talking about summaries of other witnesses, Defense Counsel brought up the possibility of Defense Counsel doing a summary of Michael St. Clair and offering it themselves.

And my response on the phone at that time was, well, I am not going to commit one way or the other; certainly not without conferring with both of my Co-Counsel. But I do recall saying more than once, you do it up and we'll look at it. We never received such a summary.

And in a later telephone call, I asked about that and was told that – by Defense Counsel that they themselves did not wish to pursue that, so that's sort of a history. And, again, I am talking about more than a couple of weeks before trial. I didn't

write down the date.

I remember the instance because Mr. Mirkin had to get going somewhere. He had to be in court somewhere late that afternoon, and we were trying to talk hurriedly. And I think the call was to Mr. Gibson's office.

(*Id.*, pp. 4-6).

In response to the foregoing, defense counsel Mr. Mirkin referred to a July 8, 2005 meeting at the Attorney General's Office, the purpose of which was to discuss whose testimony would be presented via witness summaries. (*Id.*, p. 13). That was 53 days before the August 30, 2005 hearing about the introduction of the transcript of St. Clair's prior testimony. Mr. Mirkin admitted, "There was no mention made at that meeting of Michael St. Clair." (*Id.*, p. 14). Mr. Mirkin also said:

Again, there was no mention of Mr. St. Clair except, I believe, there was a question as to whether we intended to put him on or prepare a summary.

And I think it was on that occasion, either that or when we were here on the 10th, that we said no, we weren't going to do either. We weren't going to present his testimony or reference to it. So they knew that in advance of trial. **We relied on their representation.** [12]

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[12] Defense counsel made a representation but even according to what Mr. Mirkin had just said, the Commonwealth did not.

(*Id.*, p. 16) (emphasis added).

Mr. Mirkin confirmed the fact of the second telephone conversation described by Mr. Smith and placed its date at August 3, 2005. (*Id.*, p. 15).

Later, Mr. Mirkin disclaimed acquiescence in Mr. Smith's account that the defense had volunteered their contemplation of a St. Clair witness summary. (*Id.*, p. 26). Mr. Mirkin expressed his belief, which he admitted was uncertain, that the prosecution had asked whether the defense intended to submit a St. Clair witness summary. (*Id.*). It escapes understanding how there is any practical difference between defense counsel volunteering information on their own initiative, and doing so in response to an inquiry. In either event, Mr. Mirkin did not disagree that it was defense counsel who had expressed contemplation of a St. Clair witness summary.

5.

Defense counsel were not "surprised." Defense counsel did not show that but for the alleged surprise, their presentation of mitigating evidence would have been different. Defense counsel declined an offer to augment witness summaries with live testimony.

a.

No Surprise

By now the Commonwealth has established that defense counsel were not surprised by the introduction of St. Clair's prior testimony transcript.

St. Clair's brief cites Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979) (overruled on other ground, Morton v. Commonwealth, 817 S.W.2d 218 (1991)), and Matheny v. Commonwealth, 37 S.W.3d 756 (Ky. 2001) for the proposition that the Commonwealth "welched" on its deal with the defense.

Those cases are unavailing to St. Clair. There was no deal. Workman and Matheny both envision an offer by the Commonwealth and a detrimental reliance by the defense in its acceptance of that offer.

That did not occur here. In St. Clair's case there was no offer. There was no promise or agreement by the Commonwealth to trade for anything. It is impossible to accept, much less detrimentally rely, on an offer or promise that was not made.

Defense counsel admitted that they had contemplated introducing St. Clair's prior testimony themselves in the form of a witness summary. As shown in part **B** below, defense counsel had copies of St. Clair's prior testimony transcript at hand. Defense counsel were not caught unawares.

b.

No Difference In Defense Presentation

St. Clair's brief devotes a total of two sentences to his claim of prejudice. On page 11 of his brief, St. Clair says the defense "would have cross-examined several witnesses differently and more extensively." He says the defense also "would have conducted individual voir dire differently." St. Clair's claim of prejudice is undeveloped and seems half-hearted.

c.

Invitation To Let Defense Augment Its Case

In response to accusations of prosecutorial "misdirection", the Commonwealth invited defense counsel to supplement the summaries of other witnesses with live testimony or official transcripts, whichever they preferred. This invitation was not required by law but the Commonwealth extended it anyway.

Mr. Smith: They can still call John Carr if they wanted to. They could – Ron Crain, like John Carr, lives here in this area. Stan Slonina recently retired, lives in the Frankfort area. All of these people we are talking about are readily available. And, what's more, all of the transcripts of their prior testimony is readily available.

They emphasize that they didn't Cross Examine

> Detective Melton the other day. Well, maybe they could do like they did in the first trial and recall him the way they did. They can have at it.
>
> They, themselves, supplied a summary, a supplemental summary to our summary, of Butch Bennett's testimony. As far as we knew that made them happy as could be. If they want to read Jim Reeves' transcript into the record, that's fine. [13] We couldn't stop them if we wanted to.

(TE Vol. XIX, pp. 24-25).

The transcript of this re-trial shows that Defense counsel declined the Commonwealth's invitation. [14]

B.

Redaction

A defendant's testimony about the charges against him are always relevant to his guilt and punishment.

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[13] Defense witness Jim Reeves testified at the first trial. He died before the re-trial.

[14] Defense counsel later attempted to create something to complain about by making an impossible request. Defense counsel orally requested a continuance for the purpose of searching for an expert on eyewitness identifications. (TE Vol. XIX, pp. 41-42). Defense counsel tried to characterize this as acceptance of the Commonwealth's earlier invitation to recall witnesses or read their transcripts into the record. (*Id.*). The Commonwealth objected and the oral defense motion for a continuance, *et cetera*, which lacked a supporting affidavit, was denied. (*Id.*, pp. 42-43). St. Clair raises this matter in argument **23.** of his brief. The Commonwealth mentions it here as another example of the prism through which St. Clair views the concept of offer and acceptance.

St. Clair's brief describes the redaction process somewhat unfairly. A more objective review of the record shows that:

1. The Commonwealth made sure Judge Waller and the defense lawyers each had copies of the official transcript with which to follow along and monitor. (TE Vol. XIX, pp. 28-29, 39-40). Defense counsel did not object to this.

2. It was the Commonwealth's idea to delete bench conferences and questions and answers to which objections had been sustained. (*Id.*). Defense counsel did not object to this either.

3. Defense counsel complained that the transcript of St. Clair's prior testimony referred to other witnesses. It did not, however, repeat the testimony of other witnesses. The Commonwealth renewed its invitation for the defense to recall witnesses or introduce their transcripts. (*Id.*, pp. 35-38). The Commonwealth even invited the defense introduce the videotaped deposition of St. Clair's ex-wife, Bylynn Van Zandt. (*Id.*, p. 37). Defense counsel again declined the Commonwealth's invitations.

4. Minus the bench conferences and objections, the official transcript of St. Clair's read to the jury covered some 162 pages. (TE Vol. XIX, pp. 48-148; TE Vol. XX, pp. 150-210).

In only five places did a question arise about the accuracy or appropriateness of what was read to the jury. The first instance involved an inadvertent omission of the word "why" from a sentence. (TE Vol. XIX, pp. 60-61). The Commonwealth re-read the sentence so as to include the word "why." (*Id.*, p. 61). Defense counsel were satisfied.

The second instance involved the Commonwealth's omission of hearsay it had promised to delete. The omitted hearsay was St. Clair's repetition of what witness Vernon Stephens and Stephens' mother had said about the temperature of their living room in Oklahoma, and a question by Mr. Stephens about what was going on.

The chronology regarding the second instance is this: Vernon Stephens gave a deposition at an Oklahoma proceeding in March of 1992. He and his mother died before St. Clair's first trial. The Commonwealth introduced that deposition during St. Clair's first trial. In the appeal from that first trial, this Court said it was error for the Commonwealth to have introduced Mr. Stephens' deposition, because St. Clair had committed his crimes before the July 1, 1992 effective date of the Kentucky Rules of Evidence. St. Clair v. Commonwealth, 140 S.W.3d 510, 536-537 (Ky. 2004). Prior to the commencement of the reading of St. Clair's prior testimony to the re-trial jury, the Commonwealth volunteered to

Judge Waller and defense counsel that any hearsay attributable to the Stephens deposition would be omitted in observance of what this Court had said in St. Clair, *supra*.

Therefore, regarding the second instance, omitted was St. Clair's testimony that he "heard a man's voice saying, 'Mother, it is too hot in here. Can I turn the stove down a couple of notches?' And the woman says, 'Go ahead, Son.'" (TE Vol. XIX, p. 68). Also omitted was St. Clair's testimony that Vernon Stephens said, "'What in the hell is going on?'" Defense counsel objected to these omissions. (*Id.*, pp. 68-69). The Commonwealth responded that it was what was supposed to be done. (*Id.*, pp. 69-70). The Commonwealth offered to re-read the passage in its entirety so as to include the omitted hearsay, which was done. (*Id.*, pp. 70-71). That satisfied defense counsel.

The third instance where a question arose involved a court reporter's typographical error. In his prior testimony, St. Clair was describing "a big carnival." (*Id.*, p. 81). At this point the following exchange occurred:

Mr. Mirkin: May we approach the bench?

Ms. Todd: **(bench conference:)** Judge, the next line is marked "Q" for "Question", but I believe it should be "A" for "Answer."

Mr. Mirkin: Right. I believe it is a continuing answer.

Mr. Smith: I believe it is, too. And it's one in which there was an objection and it was Sustained. So that's why I stopped where I did, and was just waiting for the next question.

Mr. Mirkin: The first part of the answer, "I told her no, don't bring him", I think is admissible. But it goes on, "Because she asked me on the phone", and that was objected to and sustained.

* * * * * * *

Mr. Smith: Well, obviously I'm not going to read that because it was sustained.

Mr. Mirkin: Yeah.

(*Id.*, pp. 82-84).

The fourth instance where a question arose involved the Commonwealth's inadvertent substitution of the word "blue" for the word "bus", which was corrected immediately when defense counsel pointed it out. (*Id.*, pp. 107-108). As in the case of the first three instances, this satisfied defense counsel.

The final instance occurred when the Commonwealth stopped and asked to approach the bench for clarification whether St. Clair's denial of having had a conversation with a prison inmate named Scott Kincaid should be omitted. (*Id.*, pp. 142-145). Judge Waller instructed the Commonwealth to include it. (*Id.*, p. 145). Defense counsel objected. (*Id.*).

As this Court can see, of the five instances where any question arose about the "*ad hoc*" redaction denounced in St. Clair's brief, three involved the Commonwealth conscientiously seeking clarification of matters which obviously seemed debatable. The two other instances involved inadvertence, in particular, oversight of the word "why" and a misreading of the word "bus", both of which were corrected on the spot. The Court also will observe that at trial, defense counsel were satisfied with the resolution of all these instances except the last, which involved the denial of having had a conversation with somebody.

CONCLUSION

St. Clair's argument concludes with the typical DPA non-sentence of string-citations to federal and state constitutional provisions not mentioned at trial. Non-preservation of grounds at trial is not cured by string-citing the Library of Congress on appeal. None of the constitutional grounds listed at the end of St. Clair's argument are reviewable by this Court.

3.

The penalty phase instructions were proper.

St. Clair's complaint about the penalty phase instructions is the same generic, boilerplate presented and rejected in every death penalty direct

appeal that comes before this Court.

St. Clair's brief concedes, albeit by negative implication, that parts **D.**, **G.**, **H.**, and **I.** of his argument were not preserved for appellate review.

Out of respect for its own rules, this Court should enforce St. Clair's procedural defaults by declining to review the merits of his unpreserved claims.

Enforcement of this Court's own procedural rules would require the federal courts to do likewise. Non-enforcement of this Court's own procedural rules undermines the authority of Kentucky's trial judges by inviting federal habeas review of claims after the trial courts of this Commonwealth have not been allowed even the opportunity to consider the merits of those claims.

No decision of the United States Supreme Court has held that the rules governing preservation and procedural default apply differently in death penalty cases. Quite the contrary is true.

Kentucky's automatic death penalty review statute, KRS 532.075, is limited in scope. The legislature has not purported to alter, nor could it change, the rules of this Court without the assent of this Court.

4.

The aggravating circumstance that the murder was committed by a person with a prior conviction for capital murder is not void for vagueness.

This claim was resolved in the Commonwealth's favor in the appeal from the first trial of this case. St. Clair v. Commonwealth, 140 S.W.3d 510, 562-570 (Ky. 2004). St. Clair's brief pretends as though the prior decision of this Court is non-existent but in fact it is the controlling law of this case.

5.

There was no factual or legal basis for directing a verdict of acquittal on the aggravating circumstance that St. Clair had a prior capital murder conviction.

Proof of the aggravating circumstance at the re-trial was the same as at the first trial. The law of this case is that St. Clair was not entitled to a directed verdict of acquittal on the aggravating circumstance that he had a prior capital murder conviction. St. Clair v. Commonwealth, 140 S.W.3d 510, 570-571 (Ky. 2004).

6.

There was no "prosecutorial misconduct" requiring a mistrial.

None of the preserved or unpreserved claims under this heading required the judge to discharge the jury and declare a mistrial. Because they are unpreserved, none of St. Clair's unpreserved claims deserve appellate review.

The trial of this case was a hard fought marathon in which the lawyers on both sides were playing for keeps. The crime was absolutely horrific. It was committed by a cross-country desperado who had strong-armed his way out of an Oklahoma jail in hopes of avoiding punishment for the latest in his series of capital murders.

A.

A serial killer is one who murders several people, one after another. St. Clair is a serial killer. That is not debatable.

During the Commonwealth's opening statement, the undersigned Assistant Attorney General said, "The Defendant in this case is a serial killer." (TE Vol. XIII, p. 48).

Before that remark could be explained, defense counsel objected on the ground that it made St. Clair sound like "Ted Bundy" or somebody "who is

compulsively driven to kill." (*Id.*, pp. 48-49).

At the bench, Mr. Smith explained that he was avoiding the words "mass murderer" because they connote somebody who has killed several people at once, as opposed to a serial murderer who kills his victims one at a time. (*Id.*, pp. 51-52). He also observed that the words "serial killer" had been complained about in the appeal from St. Clair's first trial without garnering comment by this Court. (*Id.*, pp. 50-51).

The objection by defense counsel was sustained insofar as opening statements were concerned. (*Id.*, p. 51). The jury was admonished to disregard what Mr. Smith had just said. (*Id.*, p. 56).

B.

This claim is unpreserved. Mr. Wright asked witness Dennis Reese who the prosecutor was when he pleaded guilty. The defense objected on the ground of irrelevancy. (TE Vol. XIII, p. 121). St. Clair's brief has abandoned the ground of irrelevancy and now raises "improper bolstering" for the first time in this appeal. An appellant is not allowed to change the grounds for an objection he made at trial. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1977).

C.

St. Clair did not preserve his complaint about the prosecutors' introduction as being from the Special Prosecutions Division of the Attorney General's Office.

D.

Dr. Keith Caruso testified for the defense as a mental health expert. Dr. Caruso claimed to have worked on the Uni-Bomber case, voluntarily and after the fact. Counsel for both sides asked about his CV and the private / forensic / governmental breakdown of his practice.

Cross-examination revealed that the bulk of his practice involved the billing of insurance companies as his own PLC. This questioning was responsive to questioning by the defense during re-direct examination. Contrary to the suggestion in St. Clair's brief, Dr. Caruso was never asked how much he was charging for his testimony in this case. (TE Vol. XVI, pp. 271-275).

E.

There was nothing improper in truthfully informing the jurors that the only punishment being sought by the Commonwealth was the death penalty.

F.

There is nothing improper in asking during summation to the jury that if the death penalty was not warranted in the case at hand, when would it ever be warranted.

G.

Not everything said during witness preparation finds its way to the jury. During summation, Mr. Smith told the jury that Dr. Walker had defined "serial killer." Before Mr. Smith could repeat any part of that definition, defense counsel interrupted with an objection. Mr. Smith's recollection of the testimony was incorrect. The defense objection regarding the attribution to Dr. Walker was sustained. The defense objection to the words "serial killer" was overruled. When Mr. Smith resumed his summation, he asked the jurors to abide by their own recollections of the evidence, not his. There was no prejudice to St. Clair.

Later, without attribution to Dr. Walker, Mr. Smith described St. Clair as an "elite serial killer", a "serial killer to the second power", and a "super serial killer." St. Clair serially murdered four people in Oklahoma, a young paramedic who prayed for him in New Mexico, and a father of three in Kentucky. The description was accurate and appropriate.

H.

The prosecutor asked the jury to infer from the evidence, which he correctly identified as that of the Medical Examiner, that Mr. Brady's head was bowed when St. Clair shot him first through the face from above. This was not error.

I.

A "Golden Rule" argument is one where the jurors are asked to put themselves in the place of the victim. That was not done here. The prosecutor did no more than wonder aloud what went through Mr. Brady's mind. That is not a "Golden Rule" argument.

J.

There is nothing improper about a prosecutor saying during summation to the jury that he is speaking for the victim. This matter is unpreserved for appellate review.

K.

There was no objection to the prosecutor's example of a toddler who cried so much that he shut down an entire Sunday School class. St. Clair's brief laments the "inherent connotation" that teaching such a class meant the prosecutor is a "Christian and a Christian does not lie and always tells the truth."

St. Clair's brief reads more into this than what was said. Neither wailing nor gnashing of teeth should overcome the hurdle of St. Clair's non-preservation.

L.

St. Clair's brief embellishes the transcript. None of St. Clair's three appellate lawyers attended the trial but according to them, and not the transcript, "the prosecutor moved from the bench, turned around and announced to the jury . . . ."

Defense counsel were overdoing it with interruptions to the prosecutor's closing argument. At the end of one of the bench conferences, the prosecutor finally remarked that when the other team is making a run you call a time-out. The outcome of St. Clair's re-trial did not turn on this.

M.

St. Clair's argument about the green baseball cap is absurd and deserves no response.

7.

The governors' executive agreement was not admissible as mitigating evidence.

Mitigation is evidence about a defendant's character, record, or the circumstances of his crime. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57

L.Ed.2d 973 (1978). It may be considered as a reason for lessening the defendant's moral culpability, which in turn might justify diminishing his criminal punishment. Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987).

A governors' executive agreement as to which State's maximum security prison will be used to incarcerate the defendant does not come within the ambit of mitigating evidence. It says nothing about the defendant's character, record, or circumstances of the crime he committed. It does not provide the sentencer with insight into the defendant's moral culpability or guidance regarding the criminal punishment he deserves.

The executive agreement between Oklahoma's and Kentucky's Governors provided that St. Clair would remain in Kentucky (at the Kentucky State Penitentiary) if he were sentenced to death. Only if St. Clair avoided the death penalty in both his Bullitt County capital murder trial, and in his Hardin County capital kidnapping trial, would he be returned to Oklahoma (at the Oklahoma State Penitentiary).

A governors' executive agreement can be mutually rescinded or altered at any time. The Oklahoma and Kentucky Governors who signed the executive agreement had long since left office. The jury in St. Clair's Bullitt County re-trial would have had to speculate about the outcome of his future

Hardin County re-trial for capital kidnapping. More likely, the Bullitt County jury would have been deceived by not being allowed to learn about the yet to be re-tried Hardin County charge as it relates to the governors' executive agreement.

St. Clair's brief does not actually allege an exclusion of the executive agreement from evidence. Rather, St. Clair's brief has confined argument

to defense counsel having been prevented from discussing it during opening statements to the jury. That is an important distinction.

St. Clair's brief does not venture how and through whom this evidence would have been introduced. There is no mention of any attempt at laying a foundation for it. There is no mention of whether defense counsel made an avowal.

8.

There were no improper limits on individual *voir dire.*

St. Clair's brief argues that defense counsel should have been allowed to ask prospective jurors how they felt about the death penalty and what they thought about specific kinds of mitigation. St. Clair's brief does not mention that the identical argument he presents here was rejected in St. Clair v.

Commonwealth, 140 S.W.3d 510, 534 (Ky. 2004). It is the controlling law of the case in this matter.

Mr. Gibson: Mr. Mirkin and I reviewed, again this morning, your four or five page document you provided us before, concerning the colloquy you're going to go through with each juror, and we had a couple of suggestions or comments.

Judge Waller: Well, I won't in any way, prohibit you from raising any objection you wish to make. However those are the same questions the Court used in the original trial of this case. And the Kentucky Supreme Court addressed those issues and found the questions that were asked by the Court to be proper and did not find any reversible error in the Court's Individual Voir Dire.

However, you can get on the record any objections that you have at this time.

(TE Vol. I, p. 42).

Defense counsel proposed two changes. The Commonwealth convinced defense counsel that it would be better for all that they withdraw their first suggested change. (*Id.*, pp. 43-44). The Commonwealth agreed with the second proposed change and it was made. (*Id.*, 45-46).

9.

Defense counsel are not entitled to question prospective jurors before the prosecutor does.

St. Clair's assignment of error does not allege any prejudice but instead trolls for a future change in the way individual *voir dire* is conducted. It is a seminar-inspired argument that started showing up in all Kentucky death penalty trials around the time of this re-trial.

St. Clair argues that a reference in RCr 9.38 to questions being posed by the defense and the prosecution manifests an intention on the part of this Court that the defense be allowed to ask first. This amendment to the rule was the aftermath of a drumbeat several years ago about the perils of trial judges "going it alone", to repeat DPA's oft-used phrase. The purpose of inserting this passage into the rule was to let the lawyers voice questions supplementing those asked by the trial judge. It was not intended to prescribe the sequence in which opposing counsel question the jurors.

Capital prosecutors have no incentive for practicing the art of getting a prospective juror to say something "improper", at odds with what the law actually is. Yet it is easy to generate issues for appeal by coaxing these jurors, lay

people, to guess what the law is or say what they think it ought to be. Once the juror gives an "improper" legal opinion, every question asked by the prosecutor or the judge thereafter is denounced as impermissible "rehabilitation." That is a reality of capital jury selection.

It is traditional for the Commonwealth to question each juror before the defense does. This moves the process along by minimizing contrived squabbles about "rehabilitation." The Commonwealth bears the burden of persuasion. There is no reason to depart from the way jury selection is done.

10.

None of St. Clair's 16 challenges for cause were meritorious.

Juror Melton and the Commonwealth's case officer were cousins once removed. The juror said, "Rick's father and my father-in-law were brothers." (TE Vol. I, p. 105). She agreed with defense counsel that her deceased husband and the Commonwealth's case officer were first cousins. (*Id.*, p. 118). She had known the Commonwealth's case officer all his life but in recent years she saw him only at funerals and weddings. (*Id.*, pp. 118-119). Defense counsel asked whether she had any opinion about the case officer's truthfulness. (*Id.*, p. 121). She replied, "I don't have any opinion about his truthfulness or yours, Honey."

(*Id.*). The juror said she did not want to take the time out of her life to serve in this case. (*Id.*, p. 105). The Commonwealth used one of its peremptories to remove her from the panel.

Juror Hatcher repeatedly said she could consider the entire range of possible punishments, including the minimum. The one time this juror said she could not impose the minimum, Judge Waller made a finding on the record that she had not understood the question. (TE Vol. II, pp. 43-44). Judge Waller cited Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003) in support of his ruling.

Though hesitant at times, juror Jameson repeatedly assured the court that she could consider the entire range of possible punishments. (TE Vol. II, pp. 82-85).

Juror Jetter was equivocal in response to a series of suggestions by defense counsel that she would expect the defense to introduce some evidence. (*Id.*, pp. 108-109). When the Commonwealth asked juror Jetter the question in the proper form, she assured the court she could consider the entire range of possible punishments, including the minimum. (*Id.*, pp. 109-110).

Juror Marksberry said, "The only thing that I know is he had already been prosecuted but then this was like a re-sentencing." (TE Vol. V, p. 102). In response to the defense motion for cause, the Commonwealth pointed out

that juror Marksberry expressed no knowledge beyond that which the court had already told the jury pool at the outset. (*Id.*, p. 115).

Juror Ray had read and heard about the case "when it first happened." (TR Vol. IV, p. 394). That was in 1991, some 14 years prior to this re-trial. She could not remember any details. (*Id.*, pp. 394, 400-401).

Juror Botos said it would be hard for her to impose the minimum without having heard any of the evidence but she could consider it. (TE Vol. V, pp. 144-145).

Juror Polson at one point agreed with a series of suggestions by defense counsel that the defendant would have to prove he deserved a sentence less than death. (TE Vol. VI, pp. 295-296).

> **Mr. Smith:** **(bench conference:)** Here we go again with personal philosophy again versus asking the question properly, which would be if the Court instructs you to consider mitigation. It's the same objection I have been making for the last two days and it's the same one the Court has been Sustaining.
>
> * * * * * * *
>
> This is a layman who does not understand and should not be expected to understand things like burden of proof and going forward with the evidence. And just to ask him that question of a lay person, what do you think the Defense ought to have to prove anything, he doesn't know until he is told in the question well, the

> Judge will be instructing you that you must consider it because that is the law.

(*Id.*, pp. 297-298).

Judge Waller took over the questioning and established once and for all that juror Polson was qualified to serve. (*Id.*/, pp. 301-303).

Juror Stevens thought the lengthy questions by defense counsel asked for his personal preference, not what he would do if instructed by the court. (TE Vol. VII, pp. 326-328). Judge Waller asked properly formatted follow up questions which cleared this up. (*Id.*, pp. 327-328).

When asked a properly worded question, juror Harrison made clear he could consider mitigation and the entire range of possible punishments. (TE Vol. VIII, pp. 135-141).

Juror Wilkinson did not hear anything about this case not already properly divulged by Judge Waller at the outset of jury selection, save the incorrect detail that the crime took place in Bardstown. (TE Vol. IX, p. 174).

Juror Eldridge said he could consider the entire range of possible evidence and impose punishment according to the evidence and the court's instructions. (*Id.*, pp. 237-238).

Juror Bartley repeatedly said he had not formed an opinion and would put aside what he had heard about St. Clair's prior death sentence because it was not evidence but merely the opinion of somebody he overheard in the hallway. (*Id.*, pp. 253, 262-263).

Juror Shultz twice saw a re-enactment of the crimes on television some eight to 10 years previously, on "America's Most Wanted" as he recalled. He could not remember details and had not formed an opinion about St. Clair's guilt, which was a moot point anyway by reason of his conviction. (TE Vol. XII, pp. 36-41).

Juror Massey had read about St. Clair's prior death sentence but did not believe everything he read in the newspaper, he had formed no opinion, and he would decide the case only on the evidence presented in court. (TE Vol. IV, pp. 349-355).

11.

Jurors who could not consider imposition of the death penalty were properly excused for cause.

The focus of St. Clair's argument is difficult to track. St. Clair repeats part of his argument **10.** about prospective jurors who were not excused for

cause. Interspersed with that are his complaints about the removal of several prospective jurors who could not consider imposing the death penalty.

The apparent point of St. Clair's argument is that Judge Waller was partisan in his rulings. Having answered the complaints about jurors who were not excused in argument **10.** of this brief, the Commonwealth would answer complaints about jurors who were excused by observing that the latter were not death-qualified to serve. The record does not indicate any partiality on the part of Judge Waller.

12.

There was no "improper bolstering" of witness Dennis Reese.

Apparently every time a prosecution witness scores a point, St. Clair's brief condemns it as "improper bolstering." Most of the things St. Clair complains about under this heading are those which are to be expected in question-and-answer before a jury. St. Clair cites no rule or case denouncing "improper bolstering", whatever that is. The instances complained about in St. Clair's brief are not objectionable.

13.

Once again, there was no "improper bolstering" of witness Dennis Reese.

Here St. Clair resumes his complaint about the "improper bolstering" of Dennis Reese, this time through Detective Melton. Reese drew a diagram for the jury. It represented Reese's recollection of a certain truck stop he had visited momentarily some 14 years earlier, in 1991. Detective Melton had visited the truck stop recently. He testified that Reese's diagram was accurate. The Commonwealth perceives nothing improper in having more than one witness testify that a diagram, drawing, photograph, or the like is an accurate depiction of what those witnesses observed.

14.

KRS 504.070(4) was not violated.

St. Clair claims surprise at his 2005 re-trial about a mental health witness whose report he had prior to his 2000 trial in Hardin County. The witness was Dr. Candace Walker, a psychiatrist at the Kentucky Correctional Psychiatric Center. She testified as a defense witness in the 2000 Hardin County trial. (TE Vol. XIII, p. 54).

There was a time when a lawyer could rely on assurances by a fellow member of the bar that the latter had received notice of something. As the 2005 re-trial in Bullitt County approached, counsel for both sides discussed among one another the fact that Dr. Walker was going to testify again. (*Id.*, p. 53). The only question was which side would call her. (*Id.*). The Commonwealth told the defense that she was going to be called as a rebuttal witness for the prosecution.

The issue of notice arose during opening statements on August 24, 2005. (*Id.*, p. 52). It occurred when the Commonwealth took the precaution of asking whether there would be any objection to mentioning in opening remarks that Dr. Walker had diagnosed St. Clair as a psychopath. (*Id.*). Defense counsel claimed surprise. (*Id.*, p. 53).

Mr. Gibson: Judge, we received no notice of a rebuttal witness or mental health. It's required under KRS 504.070, ten (10) days prior to trial that they file notice if they're going to have an expert in rebuttal. They haven't filed any notice.

* * * * * * *

Mr. Smith: As far as notice is concerned, the fact that we were going to be calling Candace Walker is something that we have discussed with Defense Counsel, off the record, for I am sure a good ten (10) days or longer, because it was always a running joke about which side was going to call her.

> But we were saying no, we are going to call her. They have had, for the purpose of any technical rule that may be out there, they have had actual notice that Dr. Walker is going to testify. We had a specific discussion about it on August 10th, Ms. Todd just reminded me.

(*Id.*, pp. 53-54).

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 Commonwealth complied with KRS 504.070(4). The words "written" and "in writing" do not appear in the rule. KRS 504.070(4) is a notice requirement and nothing more. Its obvious purpose is to prevent unfair surprise. Defense counsel knew well in advance of trial the identity of this witness, her whereabouts, how to re-contact her, the content of the report she gave them prior to the 2000 Hardin County trial, the content of the testimony she gave in 2000, and that she was going to testify at the re-trial. Defense counsel were not surprised in the least.

15.

The direct examination of Dr. Candace Walker was proper.

Ms. Todd's direct examination of KCPC psychiatrist Dr. Candace Walker covers 188 pages in three volumes of transcript. (TE Vol. XXI, pp. 49-154; TE Vol. XXII, pp. 156-208; TE Vol. XXIII, pp. 3-31). Only twice did the court sustain objections to leading the witness. (TE Vol. XXI, pp. 69, 92). A third objection on this ground was overruled because the question was not leading. (TE Vol. XXII, p. 168). St. Clair's brief claims two other instances of leading but the objection at trial was repetitiveness, which the court allowed because of the difficulty a jury would have in understanding the concepts being discussed. (TE Vol. XXIII, pp. 16, 29).

Ms. Todd having read Dr. Caruso's CV to Dr. Walker over the telephone was not objectionable. It was not any different than had Dr. Caruso read it himself in person. If there was any question about the accuracy of what was read, the CV was there for all to see at the trial. Nothing prevented defense counsel from questioning the accuracy of the telephone recitation by cross-examining Dr. Walker about it. Defense counsel and Ms. Todd both questioned Dr. Caruso about his CV extensively.

St. Clair's brief tries to avoid admitting that there was no objection to Dr. Walker's first mention of a lie detector. Her unresponsive answer was that people having Anti-Social Personality disorders can pass a lie detector because they do not sweat like normal people. (TE Vol. XXI, p. 113). Some 46 pages later in the transcript, Dr. Walker again gave an unresponsive answer that a person's galvanic skin response is a lie detector. This time the defense objected. (TE Vol. XXII, p. 159). There was never any suggestion that St. Clair had taken a lie detector test, that he had offered to take a lie detector test, or that he had been asked to take a lie detector test.

Dr. Walker testified that people in the private sector list diagnoses separately more often than do people in the public sector, because it affects how the private sector people will be paid. Ms. Todd's question did not mention Dr. Caruso. Neither did Dr. Walker's answer.

16.

The Commonwealth was entitled to call witnesses.

The Commonwealth is confident that it is entitled to call witnesses in a capital murder prosecution.

17.

The "other acts" evidence was proper.

It is entirely appropriate for a sentencer to learn what happened. In St. Clair v. Commonwealth, 140 S.W.3d 510, 535-536 (Ky. 2004), this Court upheld the KRE 404(B) introduction of the very same "other acts" evidence complained about here. The only difference is that by reason of the use of witness summaries, the re-sentencing jury heard fewer details than did the original jury. St. Clair v. Commonwealth is the controlling law of this case.

18.

The autopsy photographs were proper.

The same autopsy photographs introduced during the original trial were re-introduced during the penalty phase re-trial of this case. This issue is controlled by the law of the case. St. Clair v. Commonwealth, 140 S.W.3d 510, 552 (Ky. 2004).

19.

Judge Waller was not required to recuse.

St. Clair's brief argues that Judge Waller was disqualified because he had presided over the original trial. Judges re-try cases remanded to them all

the time. St. Clair's KRS 26A.020 affidavit for recusal was rejected. (TR Vol. II, pp. 153-154).

20.

There were no improper limits on individual *voir dire.*

This is a repeat of St. Clair's argument **8.** The Commonwealth already has answered it.

21.

St. Clair was not entitled to delay the re-trial yet again by firing his lawyers at the last minute.

This matter was discussed in argument **1.**, part **B.**, sections **# # 10.** and **11.** of this brief. Six days before the re-trial was scheduled to begin, St. Clair filed simultaneous *pro se* motions asking to fire his lawyers and seeking a six-month continuance. (TR Vol. III, pp. 370-378).

St. Clair's brief admits there was a hearing on this matter but he claims it was inadequate. As noted in part **C.** of argument **1.** of this brief, St. Clair did no more than give generalizations about his unhappiness with defense counsel. There was nothing presented to Judge Waller in St. Clair's *pro se* motion or at the hearing that suggested a breakdown in the attorney / client relationship as would

warrant any further inquiry.

22.

There is no right to allocution in Kentucky.

If St. Clair wanted to testify, all he had to do was take the witness stand. St. Clair was not entitled to make a speech to the jury without being sworn and without being cross-examined. St. Clair's brief cites no Kentucky authority entitling him to allocution.

23.

St. Clair was not entitled to more continuances.

St. Clair's motion for a continuance regarding his "mitigation specialist" was properly denied. Made six days before the re-trial was scheduled to begin, the motion was not supported by affidavit and failed to mention the "mitigation specialist" work already done by Jennifer Word, whose name and title appear on the second page of all of the transcripts from the first trial. St. Clair's brief does not identify any mitigation omission attributable to the denial of his continuance motion.

The "short" continuance motion referred to in St. Clair's brief was the one of indefinite duration for defense counsel to search for an expert on

eyewitness identifications. It has been addressed in argument **2.**, part **A.**, section **5.**, subsection **c.**, footnote **14** of this brief. This continuance motion was oral, unsupported by affidavit, and calculated to disrupt the re-trial that by then was well under way.

24.

There was no error in the testimony about the victim.

Melanie Drury was one of Frank Brady's adult daughters. [15] She was the only witness who testified about Mr. Brady's life. Her testimony covers less than eight and one-half pages in the re-trial transcript. (TE Vol. XIII, pp. 90-98).

St. Clair's brief criticizes the testimony by this woman as impermissible "victim impact" evidence. Victim information of the very kind and extent she supplied to the sentencing jury has been approved by this Court in cases such as McQueen v. Commonwealth, 669 S.W.2d 671 (Ky. 1984), Campbell v. Commonwealth, 788 S.W.2d 260, 263-264 (Ky. 1990), Templeman v. Commonwealth, 785 S.W.2d 259, 261 (Ky. 1990), and Wheeler v.

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[15] The court reporter misspelled her last name as "Druin." The correct spelling is "Drury."

Commonwealth, 121 S.W.3d 173, 181 (Ky. 2003).

Here, the most important appellate ruling upholding this kind of evidence is the Court's prior decision in this very case. St. Clair v. Commonwealth, 140 S.W.3d 510, 554 (Ky. 2004) is the law of this case and controls this issue.

St. Clair's brief grudgingly admits that capital sentencing testimony about a homicide victim's life is proper under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991). St. Clair argues for the first time in this appeal, though, that Payne v. Tennessee conditions the admissibility of such evidence on the existence of an "enabling" state statute.

St. Clair's newly conceived argument fails for three reasons. First, his argument that Payne v. Tennessee requires enabling state legislation was not advanced below. It is unpreserved for appellate review. *See* Kennedy v. Commonwealth, 544 S.W.2d 219, 2222 (Ky. 1976). *Also see* McDonald v. Commonwealth, 554 S.W. 2d 87, 89 (1977).

Second, Payne v. Tennessee does not require enabling state legislation. Opinions observing the existence of something are not the same as opinions ***requiring*** the existence of something. St. Clair would have this Court read into Payne v. Tennessee something that is not there. This Court followed

Payne v. Tennessee in Bowling v. Commonwealth, 942 S.W.3d 293, 303 (1997), and did so without the restriction which St. Clair reads into it now.

Third, there is a Kentucky statute authorizing the introduction of information about the crime victim. It is KRS 532.055(2)(a)(7). Moreover, decisions of this Court even preceding Payne v. Tennessee have settled Kentucky's policy of allowing the sentencer to learn information about the crime victim. *See* McQueen, *supra*; Campbell, *supra*; Templeman, *supra*.

St. Clair's brief also raises an unpreserved argument that "victim impact" evidence is improper because it is proof of a so-called non-statutory, aggravating circumstance. This Court has held that the introduction of evidence about non-statutory, aggravating circumstances (*i.e.*, anything prejudicial to the defendant) beyond proof of at least one statutory, aggravating circumstance is entirely proper in a capital prosecution. *See* Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky. 2001), collecting cases.

The testimony by Melanie Drury about her father's life did not exceed that which was approved by this Court in McQueen, *supra*, Campbell, *supra*, and Templeman, *supra*. The introduction of this testimony was entirely appropriate and should be respected, not denounced. There was no error in this regard.

25.

There was no failure to disclose exculpatory evidence.

As shown by a police report turned over in discovery, there was no tape recording of a conversation between St. Clair and Detective John Carr at the Oklahoma State Penitentiary.

26.

Hearsay attempts to impeach St. Clair's Oklahoma murder convictions were properly excluded.

Also, the prosecutor's attempt via cross-examination to refresh the memory of the witness was unsuccessful and did not impart any information to the jury.

St. Clair's brief presents two assignments of error under this heading. The first three paragraphs of St. Clair's seven-paragraph argument complain about the exclusion of hearsay testimony calculated to impeach the 1991 Oklahoma verdicts for two murders. The fourth paragraph complains about a prosecutor's unsuccessful attempt through cross-examination to refresh the memory of this witness about aggravating circumstances. The three remaining paragraphs of St. Clair's argument resume his complaint that hearsay was not

allowed to impeach the Oklahoma verdicts.

The Commonwealth will address each assignment of error separately.

A.

Hearsay And Impeachment Of Verdicts

St. Clair wanted to impeach his 1991 Oklahoma convictions for the murders of Ed Large and Mary Smith. He wanted to show that the Oklahoma murders actually were justified or should be viewed as lesser degrees of homicide instead of murder because of strife among the various families involved. He also wanted to suggest that 14 years prior to this trial, one of his aunts claimed to have seen "little green and red men running around." (TE Vol. XV, pp. 122-123, 138-139). St. Clair complains to this Court that he should have been allowed to introduce a completely hearsay account of all of this, under the tired theory that it was "not offered for the truth of the matters asserted." St. Clair's assignment of error is fantastic.

The defense called one of St. Clair's Oklahoma trial lawyers to testify. (*Id.*, p. 118). The trial lawyer, the Honorable Don Ed Payne, had been an Associate District Judge in Choctaw County, Oklahoma since 1994. (*Id.*, pp. 118-119). The defense wanted him to testify at the 2005 Kentucky trial about his

recollections of one of St. Clair's prior Oklahoma trials in 1991. (*Id.*, p. 122). The bases for the proffered testimony of this witness consisted of: his pre-trial "investigation", "discovery materials", "police reports", "witness statements", interviews he conducted, interviews his investigator conducted, and "testimony" he remembered from the 1991 Oklahoma trial. (*Id.*, pp. 122-124).

The foregoing was properly excluded. The Commonwealth objected on the grounds of hearsay, irrelevancy, improper impeachment of verdict procedure, speculation, *res judicata*, and law of the case by reason of the prior decision of this Court.

Mr. Smith: . . . I don't believe that this is the time or the place to try to impeach a verdict of a conviction that's fourteen years old in another state.

This is not allowed in PFO situations to attack the validity of priors that way and I don't think it's allowed here. And I would emphasize that this is an out-of-state situation.

It sounds to me as though Mr. Mirkin is trying to impeach that verdict by basically, you know, saying that it was some kind of self-defense or extreme emotional disturbance.

I object to relevancy . . .

(*Id.*, pp. 123-124).

Mr. Wright: . . . That's mere hearsay.

Mr. Smith: Yeah, that is.

(*Id.*, p. 124).

Mr. Smith: I believe this is yet another instance of where the Kentucky Supreme Court has addressed this matter.

I think this Court will recall that when we had the trial in 1998, there was a strenuous objection from the Defense about our wanting to introduce not only the judgments of convictions but also the information[s] or indictments, if you would, that had that language in there about shot and pistol, and whatever it was, and there was all kinds of objection. The Court – and they were citing case law saying you can't get into all of that detail.

And the Court allowed us to put in just that; just those one paragraph descriptions of the crime along with the judgments. And the Kentucky Supreme Court addressed that in its opinion and upheld the ruling of this Court. [16]

I think now for us to essentially retry those Oklahoma cases is far beyond anything that the case law contemplates or permits, and it's certainly afield of what the Supreme Court has said in this case. And so that is yet another stand

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[16] *See* St. Clair v. Commonwealth, 140 S.W.3d 510, 561-562 (Ky. 2004) for the law of the case on this issue. Citing Templeman v. Commonwealth, this Court approved of Judge Waller's ruling allowing the introduction of the Oklahoma charging documents because of the necessary, general information they provided. Citing Robinson v. Commonwealth, 926 S.W.2d 853, 855 (Ky. 1996), this Court also approved of the fact that Judge Waller limited the information to what was contained in the Oklahoma charging documents.

alone basis for excluding what they're attempting to do, is basically retry the case.

Mr. Gibson: Judge, just for a second.

Judge, it's not hearsay what Mr. Mirkin is trying to elicit from the witness. It's not hearsay because it's not being offered for the truth of the matter. It's being offered for him to explain what the St. Clair family felt or believed.

(*Id.*, pp. 129-130).

Mr. Mirkin: It's essentially a state of mind rather than proof of a matter asserted.

Mr. Smith: Talk about speculation, Your Honor. They want him to testify about how somebody else felt? And this old thing about it's not being offered for the truth of the matter asserted, it most certainly is.

But now add to hearsay, add the law of the case, add to pre-existing case law that governs the detail in which the parties can go into these priors, add to all of that that they are wanting this man to speculate about what some other people felt, people who are not here to testify, we cannot Cross Examine them, this is wholly improper.

Mr. Gibson: It's not speculation, Judge.

Judge Waller: I am going to Sustain the Objection.

(*Id.*, pp. 130-131).

As shown below, the defense repeatedly attempted to avoid Judge Waller's ruling. The Commonwealth's brief quotes from several of those exchanges because they illustrate for this Court the contumacy of the defense throughout this re-trial.

Mr. Mirkin: Of your own knowledge, had there have been prior incidents between St. Clair, and Smith, and Large?

Mr. Smith: May we approach?

[bench conference:] If he can say yes, I was there when the incidents occurred, that's fine. Otherwise it's not his personal knowledge. It's what his client told him.

Mr. Mirkin: It's not what his client told him. I specifically asked . . .

Mr. Smith: Well, what somebody else told him. And if he wasn't there he had to hear it from somebody else. That's hearsay.

Judge Waller: All right. Mr. Mirkin, I think this is rather than say "from your own knowledge", I think you need to explain what your own knowledge means to the witness. You own knowledge could be information that you extracted from reports that you have read, or it could be something you observed. And I think you can do that in another manner that wouldn't be objectionable.

Mr. Smith: And if he did read it from a report it's hearsay.

Judge Waller: It would be hearsay.

(*Id.*, pp. 132-133).

Mr. Mirkin: Did you become aware of any history of mental illness in Michael's family?

Witness: Yes.

Mr. Smith: May we approach the bench?

[bench conference:] With this question and the one before that, Mr. Mirkin has resorted right back into "when did you become aware." He needs to be more specific from that in whether he observed it or whether somebody told it to him. Because we are right back in here introducing hearsay again.

Mr. Mirkin: Judge, I don't think that is any different than asking any other witness are you familiar with thus and so family? What do you know about them? It's not hearsay. It's not based on an out-of-court statement by another person. It's based on his knowledge. He knows the family and he's represented Michael for years.

Mr. Smith: He's not asking about his reputation – the family's reputation in the community for mental illness. He's asking essentially did somebody tell you that there was mental illness somewhere in the family. That's not a proper question. It calls for hearsay and we object not only to the form but the substance of the question.

Judge Waller: Objection Sustained.

(*Id.*, pp. 135-137).

Mr. Mirkin: Do you have personal knowledge from your own observation of mental illness in Michael's family?

Witness: Yes, I do.

Mr. Mirkin: Tell us about that, please.

Witness: His aunt, Buenavista Sides, his mother's sister.

Mr. Smith: May we approach again, Your Honor?

[bench conference:] There is no foundation for this. There is no showing that he is qualified to diagnose mental illness.

Judge Waller: I agree with that. Objection Sustained.

Mr. Mirkin: **[open court:]** Sir, what observation did you personally make of her?

Witness: I interviewed her on more than one occasion. She was in jail at the time that I interviewed her a couple of times.

Mr. Mirkin: Was she involved in the facts surrounding your case with Michael?

Witness: Yes. She was a witness as a matter of fact. She testified at Michael's trial.

Mr. Mirkin: Was there evidence presented at trial of her mental illness?

Witness: I don't think there was any expert evidence. She

testified – the basis for what I said was that she testified at trial that little green and red men came to . . .

Mr. Smith: Objection, Your Honor. Objection.

[bench conference:] This is really not offered for proof of the matter; not offered to show that little green and red men were running around . . .

Mr. Mirkin: It's . . .

Mr. Smith: When it's not really offered for the truth of the matter. I think we prosecutors say oh, Judge, this is part of the *res gestae*. It's almost a joke . . .

Mr. Mirkin: He's the exception . . .

Mr. Smith: Please, if I may continue addressing the Court. He asked this man what she testified about. That is hearsay. That is improper. Moreover, Your Honor, it's not relevant to the trial of this case.

Judge Waller: All right. On both counts the Objection is Sustained.

(*Id.*, pp. 137-139).

B.

Cross-Examination To Refresh Memory

St. Clair's argument on this issue is misleading despite being only three sentences in length. St. Clair implies that the prosecution asked an improper cross-examination question of this witness and received a prejudicial answer.

Neither event occurred.

The prosecution showed the witness an Oklahoma verdict form from a case in which he had not defended St. Clair. (*Id.*, pp. 147-149). The defense, the prosecution, the witness, and the trial judge all were aware that it was not the Oklahoma verdict form used in the case where the witness had defended St. Clair. (*Id.*).

Defense counsel expressly did not object to this display or to the prosecution's foundational question of whether the verdict form was typical of that used in Oklahoma. (Mr. Mirkin: "Now we didn't object to showing him the forms for the question of "Is this typical of a verdict form?") (*Id.*, p. 148).

Defense counsel did object to the prosecution's question whether the format used in a verdict form the witness had not seen until then helped refresh his memory about the aggravating circumstances listed on the verdict form in the case he had defended. (*Id.*, p. 147). (Mr. Mirkin: "But I do object to saying does this refresh your recollection as to what the circumstances were in the other case.") (*Id.*, pp. 148-149).

The prosecution again explained that the only thing attempted to be done was use the familiar "check-the-box-boiler-plate" format to "jog his memory. If it doesn't, it doesn't." (*Id.*, p. 149).

When he was finally asked the question, the witness said the verdict form did not refresh his memory anyway. (*Id.*, p. 150). There was no error in the foundation for the question, in the question itself, or in the answer to the question. Nothing came of this matter. There was no prejudice to St. Clair.

27.

The parties mutually agreed to the use of summaries of testimony from the first trial.

St. Clair's brief admits this issue is unpreserved for appellate review. **"I agree with it a hundred and ten percent."**

– Michael St. Clair
TE Vol. I, p. 41

It occurred to the defense that abbreviating the evidence would redound to St. Clair's benefit. The defense originally wanted this entire re-trial to consist of so called "witness summaries" from the first trial, citing Boone v. Commonwealth, 821 S.W.2d 813 (Ky. 1992) as authority. Prior to re-trial, the defense contended that Boone ***compels*** the use of witness summaries. That was an exaggeration. Boone permits but does not require the use of witness summaries in a re-trial.

To a large extent, the Commonwealth relented in this defense strategy. [17]

All of the summaries used here were derived from the sworn, cross-examined testimony of witnesses at the first trial. The parties exchanged proposed summaries of each witness prior to the re-trial. Each side was allowed to review the other side's proposed witness summaries. Counsel for the parties discussed among themselves the content of these witness summaries before they were introduced.

Even though it was not legally required to do so, the prosecution took the precaution of having St. Clair personally address Judge Waller in open court, in the presence of defense counsel, about the witness summary procedure. St. Clair assured Judge Waller that he had no disagreement with this procedure and no objection to any of the witness summaries about to be introduced. The Commonwealth was persistent about getting a personal waiver from St. Clair, because defense counsel initially deflected it while everyone knew that DPA would argue on appeal that a waiver by counsel was not satisfactory.

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[17] **Mr. Smith:** We met up with Defense Counsel. We had these hearings. As I recall, they were the ones chomping at the bit citing Boone v. Commonwealth, initially wanting to pare this down as much as possible, understandably. I think we met them more than halfway on this. (TE Vol. XIX, p. 23).

Ms. Todd: Well, I am talking about the proposed procedure to be used in front of this jury and getting a waiver of sorts from the Defendant.

We have talked about – last time we were here we talked on the record about the attorneys' discussions with their clients. But Commonwealth would seek something to place on the record that this Defendant is aware of the procedure and is willing to go along with it.

Mr. Mirkin: I thought we had done that the last time.

St. Clair : I'll do it again if you want.

Judge Waller: Go ahead, Mr. St. Clair.

St. Clair: I understand and I agree with it. Just like my attorneys[ ] said, I think it was the 10th of this month, and I agree with it a hundred and ten percent to go that way.

Judge Waller: When you say "go that way", you understand the testimony in this case will be presented both in summaries of witnesses' testimony from the previous trial and by live testimony?

St. Clair: Yes. That's what I mean.

Judge Waller: And you are agreeable to that?

St. Clair: Yes.

Ms. Todd: Thank you.

(TE Vol. I, pp. 40-41).

A witness summary introduced by agreement of the parties is a stipulation. It does not implicate hearsay or confrontation. This issue is not reviewable because defense counsel affirmatively pursued the procedure used here and St. Clair himself agreed with it "a hundred and ten percent." (*Id.*, p. 41).

28.

Use of the Oklahoma charging documents is the law of this case.

St. Clair's brief complains about the introduction of excerpts from the charging documents regarding his Oklahoma murder convictions. This Court resolved the identical issue in the 2004 decision of St. Clair's case. In light of the circumstances shown below, it would be especially inappropriate to revisit the matter in this appeal.

Re-trial defense counsel admitted that St. Clair v. Commonwealth,140 S.W.3d 510, 561-562 (Ky. 2004) states the law of the case on this issue. [18] Mr. Mirkin said,

> I know we were Overruled on that. The Supreme Court has affirmed the Court so that is the law of

[18] Citing Templeman v. Commonwealth, this Court approved of Judge Waller's ruling allowing the introduction of the Oklahoma charging documents because of the necessary, general information they provided. Citing Robinson v. Commonwealth, 926 S.W.2d 853, 855 (Ky. 1996), this Court also approved of the fact that Judge Waller limited the information to what was contained in the Oklahoma charging documents.

> the case. But just for purposes of preservation, we would restate that objection.

(TE Vol. XXI, p. 3).

St. Clair's brief does not acknowledge the existence of the law of the case disposition of this matter. Instead, St. Clair's brief argues the issue as though it arose for the first time during the re-trial. In declining to acknowledge the existence of law of the case, St. Clair's brief does not suggest that the ruling on this matter at 140 S.W.3d 561-562 was erroneous. The result is that St. Clair's brief has deliberately forfeited this assignment of error.

29.

St. Clair's death sentence is not arbitrary or disproportionate.

Signed by three DPA death penalty lawyers, St. Clair's brief proclaims, "There is compelling mitigation in this case." St. Clair's brief goes on to regale some of the mitigating evidence introduced during the penalty phase trial and re-trial of this case.

St. Clair's brief makes an excellent point about counsel effectiveness in the investigation and presentation of mitigating evidence but misses the point about capital sentencing.

The evidence of aggravating circumstances (statutory and non-statutory alike) was superabundant. St. Clair is known to have murdered at least six people in three different States. He was proven to be a psychopathic, cross-county, serial killer. He had four prior murder convictions in Oklahoma and sentences of life without parole for each of those murders. In addition, he had convictions for conspiracy to commit murder and for felonious larceny. He kidnapped, carjacked, and handcuffed a young paramedic in Colorado who prayed aloud and displayed a photograph of his baby daughter in hopes of receiving mercy. Instead, St. Clair executed the paramedic in New Mexico, just before entering Texas, because Texas enforces its death penalty laws. St. Clair returned from the execution laughing. St. Clair kidnapped, carjacked, and handcuffed Frank Brady in Kentucky. St. Clair marched Mr. Brady into the woods, at night, and executed him. He demonstrated no remorse whatsoever. Afterwards, St. Clair tried to murder a Kentucky State Trooper during a traffic stop. There were aggravating circumstances aplenty.

Contrary to the suggestion made in St. Clair's brief and in all other DPA direct appeal death penalty briefs, Kentucky is not a "weighing" or "balancing" State. McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996). As approved by the United States Supreme Court in cases such as Tuilaepa v.

California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), a capital sentencer properly channeled and presented with aggravating and mitigating evidence has "unbridled discretion" in choosing the appropriate punishment from among the available options. Proportionality review by this Court is not constitutionally required. Pulley v. Harris, 465 U.S. 87, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); McQueen v. Scroggy, *supra*. Rather, appellate court proportionality review is a creature of State statute, KRS 532.075, which means it is not reviewable by the federal courts.

The identity of the shooter was resolved by the trier of fact based on the evidence. The entreaty in St. Clair's brief for this Court to sit as an appellate jury is not realistic.

St. Clair's brief laments that other murderers deserving of the death penalty have escaped capital punishment. Under St. Clair's approach, the death penalty would have to be abolished because of the failure of California authorities to capture, convict, and execute the Zodiac killer. St. Clair's argument cannot be taken seriously.

30.

St. Clair's claim is unpreserved.

Aggravating circumstances need not be charged in the indictment.

St. Clair's argument has two components. They are non-preservation and the familiar complaint that the aggravating circumstance was not charged in the indictment. The latter component is the substantive claim itself. As in other assignments of error, St. Clair's brief omits any mention that the substantive claim he presents here was disposed of by this Court in the direct appeal from his first trial. St. Clair v. Commonwealth, 140 S.W.3d 510, 559-560 (Ky. 2004) resolved St. Clair's present claim and it is the law of this case.

A.

Non-Preservation

St. Clair admits his claim is unpreserved for appellate review. He devotes part of one sentence to his conclusion that the claim is "jurisdictional." St. Clair's "jurisdictional" assertion is undeveloped, to say the least. No authority is cited. It is not a full and fair presentation of any argument why it is "jurisdictional" or why this Court should excuse the non-preservation of his claim. St. Clair's half-sentence proclamation does not allow the Commonwealth a fair

opportunity to respond and it does not afford this Court a fully advised opportunity to decide whether the claim is "jurisdictional."

B.

Law Of The Case

In the direct appeal from the first trial of this case, St. Clair raised an unpreserved claim – the same claim not preserved at the re-trial and re-presented in this appeal – about the indictment not having charged the aggravating circumstance. This Court said:

> *FAILURE TO CHARGE AGGRAVATING CIRCUMSTANCE IN INDICTMENT (# 18)*
>
> We find no merit in Appellant's contention that the Commonwealth was precluded from seeking the death penalty because the Bullitt County Grand Jury's indictment did not identify the aggravating circumstance. Although "a defendant cannot be made to face the sentencing phase of a capital trial unless he or she is first given sufficient notice of the Commonwealth's intention to seek the death penalty[,]" Commonwealth v. Maricle, Ky., 15 S.W.3d 376, 379 (2000), "[t]here is no authority supporting [Appellant's] claim that an aggravating circumstance must be described in the indictment." Wheeler, 121 S.W.3d at 185. *See also* Garland, Ky., 127 S.W.3d at 546; Furnish, 95 S.W.3d at 41. The Commonwealth complied with KRS 532.025(1)(a) by providing Appellant with written notice "prior to trial" – in fact, approximately two and a half (2 ½) years prior to trial – of the evidence

> in aggravation that it intended to introduce. "At no time prior to this appeal did defense counsel complain of insufficient notice and Appellant may not claim such at this time." *Id.*

Commonwealth v. St. Clair, *supra*, 140 S.W.3d at 559-560.

St. Clair's brief does not acknowledge the existence of the law of the case disposition of this matter. Instead, St. Clair's brief argues the issue as though it arose for the first time during the re-trial. In declining to acknowledge the existence of law of the case, St. Clair's brief does not suggest that the ruling on this matter at 140 S.W.3d 559-560 was erroneous. The result is that St. Clair's brief has deliberately forfeited this assignment of error.

31.

Lethal injection and electrocution are not cruel and unusual punishment.

St. Clair's brief admits non-preservation of these claims. Review should be denied.

32.

The death penalty is constitutional.

St. Clair's brief admits non-preservation of this claim. Review should be denied.

33.

This Court's proportionality review is not flawed.

DPA is not entitled to this Court's proportionality review data.

Both of these claims are unpreserved for appellate review. St. Clair's brief does not even address the issue of preservation or non-preservation as required by CR 76.12(4)(c)(v). Review should be denied.

34.

Death qualifying a capital jury is constitutional.

St. Clair's admits non-preservation of this claim. Review should be denied.

35.

The law does not recognize "residual doubt."

This claim is unpreserved for appellate review. St. Clair's brief does not even address the issue of preservation or non-preservation as required by CR 76.12(4)(c)(v). Review should be denied.

36.

There was no cumulative error.

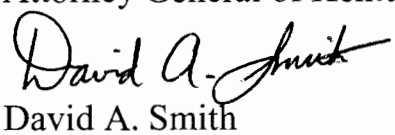
There were no individual errors. Consequently, there is no basis for this Court to find cumulative error.

CONCLUSION

The judgment of the Bullitt Circuit Court should be affirmed.

Respectfully Submitted,

Jack Conway
Attorney General of Kentucky



David A. Smith
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Appellee
Commonwealth of Kentucky